88-630

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

—o—

STATE OF ALABAMA,

Petitioner,

v.

BENJAMIN F. COX, and
BENNIE J. HAYS,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

—o—

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QUESTIONS PRESENTED

1. Does the Equal Protection Clause prohibit white defendants charged with murdering a black person from using a state system of peremptory challenges to exclude black veniremembers from the jury solely because of their race?

2. Should the requirements and guidelines of *Batson v. Kentucky*, 476 U.S. 79 (1986), be extended to the use of peremptory challenges by defense counsel representing white defendants charged with crimes against black victims?

PARTIES

The caption contains the names of all the parties below, except Honorable Michael E. Zoghby, Judge of the Circuit Court of Mobile County, Alabama, who was the respondent in the mandamus proceeding below.

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OPINIONS BELOW

1. The unpublished opinion of the trial court, the Circuit Court of Mobile County, Alabama, denying the State's "Substitute Motion to Prohibit Defendants from Exercising their Peremptory Challenges to Remove Blacks from Jury Service Solely on Racial Grounds" is reproduced as Appendix V, hereto (5a-8a).

2. The Alabama Court of Criminal Appeals did not issue an opinion. Its unpublished order denying the petition for a writ of mandamus to the trial court is reproduced as Appendix I, hereto (1a).

3. The Alabama Supreme Court did not issue an opinion. Its unpublished order denying the State's petition for a writ of certiorari to review the Court of Criminal Appeals denial of the mandamus petition is reproduced as Appendix III, hereto (3a).

JURISDICTION

The order of the Alabama Supreme Court denying the State's petition for certiorari review of the Alabama Court of Criminal Appeals' denial of mandamus relief is dated August 16, 1988 (3a). The jurisdiction of this Court is based on 28 U.S.C. § 1257(3). A further discussion of jurisdiction in the context of which lower court the writ of certiorari should run to is contained on pp. 23-28, below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment, which provides: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

2. *Code of Alabama* 1975, § 12-16-100(a), which provides: "In every criminal case the jury shall be drawn, selected and empaneled as follows: . . . the court shall require a strike list or lists to be compiled from the names appearing on the master strike list. . . . A strike list shall be furnished for the trial of any case at hand and a copy thereof given to all parties. The jurors whose names appear thereon shall be brought into open court, the case shall be called and in the presence of the district attorney and the defendant and his attorney, the jurors shall be examined on voir dire for the trial of the case at hand. After the conclusion of the voir dire examination and the removal from the strike list of the names of those jurors who were challenged or excused for good reason, the district attorney shall be required first to strike from the strike list the name of one juror, and the defendant shall strike one, and they shall continue to strike off names alternately until only 12 jurors remain on the strike list and these 12 jurors thus selected shall be the jury charged with the trial of the case. . . ."

———o———

STATEMENT OF THE CASE

The Crime

Respondents are two Ku Klux Klansmen awaiting retrial on charges of aiding and abetting a brutal, racially-motivated murder of a young black man in Mobile, Alabama.[1] The murder was part of the local Klan's response to news that a Mobile County jury had been unable to reach a verdict in a case involving a black man accused of murdering a white police officer. *Hays v. State,* 518 So.2d 749, 752 (Ala.Cr.App. 1985), *aff'd in part and rev'd in part,* 518 So.2d 768 (Ala. 1986), *cert. denied,* 108 S.Ct. 1099 (1988).[2] That development was discussed at a Klan meeting, and thereafter some Klansmen went looking for a black man to lynch. 518 So.2d at 752. Other Klansmen burned a cross on the grounds of the Mobile County Courthouse that same night. *Id.*

Michael Donald had the misfortune to be the first black man the Klan hunting party found alone that evening. He was walking along the street when the Klansmen spotted him. They lured the young man to their car by asking for directions, and when he approached the car the Klansmen abducted him. *Id.*

---

[1]Respondents contend that they resigned from the Klan after the murder and before the trial, but it is undisputed that they were active Klansmen at the time of the murder. (41a)

[2]*Hays v. State, supra,* involved the conviction and sentence of respondents' co-conspirator Henry Hays, the Exalted Cyclops of the Mobile Klavern. *Id.,* at 752. Respondent Bennie J. Hays in this proceeding is the father of Henry Hays. (5a) Both the father and son as well as respondent Benjamin F. Cox were Klansmen in Mobile.

The murder discussed in *Hays v. State, supra,* is the same murder involved in this case. (5a)

The Klansmen drove the terrified young black man to a secluded area that night. On the way, they tormented him. They asked him if he had heard of the Atlanta killings and told him he could wind up like that. Michael Donald begged for his life, pleading, "Oh God, I can't believe this is happening. Do anything you want to just . . . just let me go. . . . Oh, God. Please you can do anything you want to to me. Beat me or anything, just don't kill me." *Id.*, at 752.

Notwithstanding the victim's pleas for his life, the two Klansmen who abducted him put a hangman's noose around his neck and choked him. They beat him. They stabbed him. Then, they took Michael Donald's body and used the rope to hang it from a tree on Herndon Avenue in Mobile. *Id.*, at 752.

As the Alabama Supreme Court found, Michael Donald was selected as the murder victim "solely because he was black." *Ex parte Hays*, 518 So.2d 768, 780 (Ala. 1986). One of the judges of the Court of Criminal Appeals described the actions of the defendant in *Hays v. State, supra*, as "abhorrent and shocking, cowardly and indicative of a mindless racism and moral depravity that is closer to a purulent disease than an attitude." 518 So.2d at 766.

Neither respondent in this proceeding is accused of personally choking, beating, stabbing, or lynching Michael Donald. However, both are charged with aiding and abetting those acts. For example, the State proved in a co-defendant's trial, *Hays v. State, supra*, that one of the respondents in this case (Benjamin Frank Cox) supplied

the rope used to choke the victim and hang his body from a tree. 518 So.2d at 751.[3]

The Procedural History And Facts Specifically Relating To The Questions Presented

The joint trial of the two respondents in this case began on February 1, 1988 and ended in a mistrial on February 5, 1988 when one of the respondents appeared to become ill. (5a)[4] The trial is to be rescheduled after the issue raised in this petition is settled. (5a) The State's motion to prevent respondents from using their peremptory challenges at the retrial to exclude black jurors solely on the basis of race (34a-35a) arose from the events which occurred in connection with their first trial.

Before their first trial, the State filed a motion to prohibit respondents from exercising their peremptory challenges to remove blacks from the jury solely because of their race, and a hearing was held on that motion. (38a-45a) At that pretrial hearing on January 29, 1988, counsel for respondents explained why they believed it would be proper for them to peremptorily strike blacks from the jury for racial reasons. Counsel for respondent Cox (6a) admitted:

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[3]Henry Hays, who is not involved in this proceeding, has been convicted of a capital offense and sentenced to death for his role in personally committing the murder of the victim. *Ex parte Hays, supra.* The two respondents in this proceeding face non-capital murder charges. (5a)

[4]All of the trial court materials contained in or excerpted in the appendix to this petition were attached to and incorporated into all of the mandamus and certiorari petitions in the Alabama appellate courts. Therefore, they are part of the record before this Court.

> Because I'll you (sic) why I'm going to strike, if I strike blacks. Because it's a Klan case, the same reasons I'd strike Jewish people if I had a PLO Defendant.

(39a) He explained that the Klan is "an organization who through, what a hundred years now, has been preying on black people." (40a)

Counsel for respondent Hays (6a) even indicated he felt he might have an ethical duty to strike all the blacks off the jury:

> I'm, you know, if I deem it appropriate to strike every black person that's on the panel, I'm going to do it, and I guess if you order me not to it (sic), I'm going to either get out of the case, or you're going to have to put me in jail.

(40a) After the district attorney remarked that that was defense counsel's problem, counsel for Hays continued:

> Well, that may be my problem, and I may be sitting in jail, but I'm not, certainly not going to, you know, I've got an ethical problem here.
>
> Your Honor tells me I can't strike all the black (sic) I want to, and I feel it's in the best interest of my client, you know, we have got a problem. We've got a real bad problem.

(41a)

Counsel for respondents argued that *Batson v. Kentucky*, 476 U.S. 79 (1986), concerned only the rights of defendants and not the rights of any black prospective jurors. (42a) They insisted that "[t]he law says that a Defendant can strike anybody he wants to for any reason" (44a), and that a defendant's use of peremptory challenges could not be restricted until the United States Supreme Court

changes the law. (45a) When the district attorney argued that defense use of peremptory strikes in a racially discriminatory fashion was not lawful, proper, or morally correct, defense counsel responded:

> Morality has nothing to do with it at this point, Judge. It's what the law says, and the law says we are entitled to do it, and until the Supreme Court says we are not entitled to do it, I respectfully submit to Your Honor, that you are bound to follow the rules. (45a)

The trial judge indicated that he was troubled by the defense's assertion that a member of a white hate group accused of murdering a black man "purely because of race, and for no other reason" could insist on excluding all blacks from the jury. (43a) However, the judge deferred a ruling on the State's motion until the trial. (43a)

Voir dire and jury selection was conducted on February 1, 1988. (36a) Counsel for respondents had "an unlimited opportunity to question veniremembers concerning their biases and prejudices." (6a) Black veniremembers were questioned both as a group and individually about whether they could be fair in a case involving a Klansman alleged to have killed a young black man in a racially motivated murder. (6a-7a, 23a-24a)[5] The one black veniremember who indicated he could not be fair in a case involving Klan defendants was challenged for cause and removed. (6a, 24a)

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[5]The trial court made fact-findings concerning the events in question (5a-8a), and it expressly found that Assistant District Attorney Jackson's evidentiary hearing testimony describing what occurred during voir dire and jury selection was true (7a). Excerpts from that testimony are contained on 17a-26a.

After removals for cause, sixty-five veniremembers remained. Sixteen, or twenty-five percent, of them were black. All sixteen of those black veniremembers indicated they could fairly try the case. (6a, 24a) Under Alabama's strike down method of selecting a jury, see p. 2, above, each side had twenty-six peremptory challenges to use to reduce the number of veniremembers to twelve actual jurors. (6a, 20a-21a, 32a) The defense's twenty-six peremptory challenges were divided between the two defendants. (20a-21a, 32a)

Respondent Cox, through his counsel, used nine of his 13 strikes to remove blacks from the jury, and Respondent Hays used seven of his 13 strikes to remove blacks. (6a-7a, 20a-21a, 32a) Through their joint effort, respondents succeeded in striking every one of the 16 black veniremembers leaving an all-white jury. (6a-7a, 23a) Eight of the sixteen blacks the defense excluded from the jury were men and eight were women. (20a-21a, 33a) The sixteen black people the defense used their peremptory strikes to exclude from the jury were of different ages and different economic groups, and they had no common characteristic other than race. (7a, 24a-25a) Thus, they well represented the diversity of Mobile County's 114,983 black citizens, who constitute 31.8 percent of its population. Bureau of Census, *1980 Census of Population: Alabama*, at p. 2-27.

After the defense used their peremptory challenges to remove all the blacks from the jury, the district attorney renewed his motion and requested that the defense be required to make a showing as to why it removed all sixteen blacks from the jury. (36a-37a) The district

attorney requested that if the defense could not show race-neutral reasons for striking the sixteen black prospective jurors, then those sixteen strikes should be disallowed. (37a) The trial court denied the motion based on its "understanding that *Batson* does not apply to defense counsel." (37a) The case proceeded to trial before an all-white jury, but a mistrial was later declared after one of the respondents appeared to become ill. (5a)

After the mistrial, a retrial was scheduled. Knowing that the defense would once again use peremptory challenges to remove all the blacks from the jury at the retrial, on April 8, 1988, the State filed a substitute motion to prevent the defense from using peremptory challenges at the retrial to remove black jurors solely because of their race. (5a, 34a-35a) The State's substitute motion set out all the events that occurred during jury selection at the first trial, and it incorporated transcripts of the hearings before the first trial. (7a) An evidentiary hearing was held at which an assistant district attorney testified concerning voir dire and the defense's use of peremptory challenges to exclude blacks before the first trial. (7a, 17a-26a)

The State's substitute motion sought an order prohibiting the defense from using peremptory challenges to remove blacks solely because of their race; ordering that any racially motivated peremptory challenges would be disallowed; or, alternatively, ordering that defense counsel's use of peremptory challenges would be governed by the principles and guidelines applied to prosecutors in *Batson v. Kentucky,* 476 U.S. 79 (1986). (34a-35a) The motion was based on the Equal Protection Clause

of the United States Constitution and the State's contention that defense use of peremptory challenges to remove blacks from the jury solely because they are black violates federal equal protection principles. (35a)[6]

At the hearing on the State's substitute motion, counsel for respondents insisted that the Equal Protection Clause and Fourteenth Amendment protected only the rights of criminal defendants. (27a-30a) The Court agreed. On May 20, 1988, it entered judgment denying the State's substitute motion and held that the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), were inapplicable to defense counsel, and "[u]nder the law as it now exists, defendants do not have to give a reason for the exercise of their peremptory challenges." (7a-8a) That judgment order left respondents free to exercise their peremptory challenges in a racially discriminatory fashion to produce another all white jury at the retrial.

In order to prevent that, the State filed a mandamus petition in the Alabama Court of Criminal Appeals, seeking an order compelling the trial court to grant the State's substitute motion to prohibit the defense from using their peremptory challenges at the retrial to remove blacks from the jury solely on racial grounds. (9a-11a)[7] One of the grounds of that petition was the Equal Protection Clause of the United States Constitution. (10a-11a) On

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[6]The motion and subsequent appellate actions also asserted Alabama law grounds for relief which were rejected, too. Those are not pursued here, because they do not involve federal constitutional issues.

[7]The mandamus jurisdiction of the Court of Criminal Appeals is discussed at pp. 23-24, below.

June 28, 1988, the Court of Criminal Appeals denied the State's mandamus petition without an opinion. (1a) On July 15, 1988, it denied the State's rehearing application. (2a)

After the Court of Criminal Appeals' denial the State sought certiorari review in the Alabama Supreme Court. (12a-13a) On August 16, 1988, the state high court denied that certiorari petition (3a), thereby leaving the denial of mandamus judgment intact. Out of an abundance of procedural caution, the State also filed a new mandamus petition in the Alabama Supreme Court (14a-16a) that was materially identical to the one denied by the Court of Criminal Appeals. See pp. 25-26, below. The Alabama Supreme Court denied the mandamus petition an August 16, 1988, also. (4a)

The result of the state appellate court proceedings is to leave in effect the trial court's order and holding that use of peremptory challenges by defense counsel to exclude blacks from jury service on purely racial grounds is not a violation of federal Equal Protection principles.

Respondent's retrial has been continued until after this Court rules on this petition.

REASONS FOR GRANTING THE WRIT

In *Batson v. Kentucky,* 476 U.S. 79, 89 n. 12 (1986), this Court expressly left open the question of "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." That is an

important question of federal law which this Court should settle. Moreover, the Alabama courts decided the question in a way which conflicts with the views of the Justices of this Court who expressed an opinion on the question in *Batson*. The extreme facts of this case illuminate the issues in a helpful way, and this Court may not soon have another opportunity in which the issues are as clearly presented.

The Issues Are Important Both In Terms Of The Interests At Stake And In Terms Of The Frequency With Which The Issues Arise

As this Court noted in *Batson*, "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. at 85. For more than a century since the Fourteenth Amendment was ratified, this Court has engaged in unceasing efforts to eradicate racial discrimination in the selection of juries. *Id.*, at 85; *see, Rose v. Mitchell*, 443 U.S. 545, 558 (1979) ("the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice"). This Court's efforts have been informed by awareness that racial discrimination in jury selection not only impinges the rights of the defendant, but also violates the constitutional rights of the excluded jurors, harms every member of their race, prejudices the administration of justice, and damages society as a whole. That is no less true when the racial discrimination is practiced by state-licensed defense attorneys who, while acting as officers of a state court, use the state-created mechanism of peremptory challenges in a state courtroom before a state

court judge who enforces their racially discriminatory exclusions.

This Court has held that, "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Commission of Greene County,* 396 U.S. 320, 329 (1970) (footnote omitted); *accord, Batson v. Kentucky,* 476 U.S. at 87. In *Strauder v. West Virginia,* 100 U.S. 303 (1880), this Court explained that jury selection discrimination, at least where sanctioned by state law, harms all members of the minority excluded from jury service, because it is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.,* at 308; *accord, Batson v. Kentucky,* 476 U.S. at 88.

The issues presented in this case involve not only the interests of black citizens but also important concerns of the criminal justice system and society as a whole. Discriminatory practices in jury selection, whatever their source, "cast doubt on the integrity of the whole judicial process," *Peters v. Kiff,* 407 U.S. 493, 502 (1972), and ending such discrimination "is also critical to public confidence in the fairness of the criminal justice system," *Taylor v. Louisiana,* 419 U.S. 522, 530 (1975). Important societal interests are at stake, because racial discrimination in jury selection "is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas,* 311 U.S. 128, 130 (1940). The pernicious effects of racial discrimination in jury selection are not

mitigated simply because it is practiced on behalf of a defendant, particularly when the defendant is a white charged with the murder of a black.

The issues involved in this petition arise frequently. While there is apparently no data on how many prosecutions each year involve white-on-black crime, the significance of the problem can be inferred from inter-racial crime statistics. In 1986, the last year for which data is available, over 81,000 blacks were the victims of rapes, robberies, assaults, or attempts thereof, committed by whites. Bureau of Justice Statistics, Department of Justice, *Criminal Victimization in the United States, 1986* (NCJ-111456, Aug. 1988), at 46, 50. That number does not include non-violent crime, *id.*, nor does it include homicides and kidnappings, *id.*, at 1. Undoubtedly, every year there are thousands of criminal prosecutions involving white-on-black crime. A significant number of those prosecutions involve, or potentially involve, the issue of whether a white defendant can use his peremptory challenges to remove blacks from the jury solely because they are of the same race as the victim. It is an issue which needs to be decided by this Court.

The Facts Of This Case Illuminate The Issues In A Striking Way

In this case, there is no doubt about what defense counsel for the two respondents have done and will do. At the first trial they used sixteen peremptory challenges to remove every single black from the jury. The sixteen blacks they excluded were of both sexes, different ages, different socio-economic groups, and shared no common characteristic except their race. See p. 8, above. None of

the sixteen were removable for cause and all of them had indicated they could fairly try respondents. See pp. 7-8, above. Moreover, counsel have persistently argued for and been granted the prerogative to exclude because of their race all the blacks from the jury at the retrial. See pp. 5-7 and 10, above.

The motive of defense counsel in striking all the blacks from the jury is made clear by counsel's brazen admission: "[b]ecause its a Klan case, the same reasons I'd strike Jewish people if I had a PLO Defendant." See p. 6, above. So adamant are counsel about their intention to strike blacks because they are black that one of them has threatened to withdraw from the case or go to jail in defiance if any court order is issued that impedes his removal of all blacks from the jury. See p. 6, above.

The state trial court expressly acknowledged defense counsel's racially discriminatory motive and was troubled by it (43a), but nonetheless felt it was constitutionally permissible. The Alabama appellate courts have agreed. See pp. 10-11, above. Thus, the Alabama courts have sanctioned the use by defense counsel of peremptory challenges, provided by state law, to exclude an entire race of jurors from jury service whenever defense counsel choose. The race of excludable jurors, while a minority, comprises one-fourth of the state's population and nearly one-third of Mobile County's population. Bureau of Census, *1980 Census of Population: Alabama*, at pp. 2-27.

Moreover, the federal Equal Protection Clause issue has been clearly presented and ruled upon by the state courts. See pp. 9-11, above. Counsel for respondents convinced the state court that unless and until this Court

ruled to the contrary, they have an absolute right to strike blacks from the jury solely because of their race:

> Morality has nothing to do with it at this point, Judge. It's what the law says, and the law says we are entitled to do it, and until the Supreme Court says we are not entitled to do it, I respectfully submit to Your Honor, that you are bound to follow the rules.

(45a) This Court should hold that "the rules," including the Equal Protection Clause, do not permit racially discriminatory use of peremptory challenges by either side.

The fact that this case involves a racially motivated Ku Klux Klan murder does not make it any less appropriate as a vehicle for deciding the reverse-*Batson* issue. It is that very characteristic of the case that prompted counsel for respondents to be so candid about their actions and motives. Counsel argued that even if *Batson v. Kentucky, supra,* were applicable, the fact that it was a Klan murder was a sufficient reason for striking all black jurors—"a good Batson exception" and "a good Batson reason for striking." (39a-40a) However, this Court's opinion in *Batson* requires that race-neutral reasons be given and expressly forbids any assumptions "which arise solely from the juror's race." 476 U.S. at 97-98.

Under *Batson* it seems clear that the prosecution could not exclude blacks from the trial of a black defendant accused of the racially motivated murder of a Klansman. It is equally clear that if *Batson* applies to the defense then a Klansman accused of the racially motivated murder of a black cannot exclude blacks from the jury, either. The equal protection principles articulated in *Batson* require truly race-neutral reasons and admit of no exception to the requirement that blacks not be excluded

from jury participation because of their race. In this case, each of the sixteen blacks struck from the jury had affirmatively represented that they could fairly try this case even though it involved a Klan murder of a black victim. To accept respondents' argument that blacks as a class cannot be trusted as jurors in a case like this one is to endorse not only that racist view but also the equally insulting view that blacks cannot be counted upon to tell the truth during voir dire in such a case.

Alternatively, even if it were not clear that the facts of this case do not constitute an exception to *Batson's* requirement of race-neutral reasons, then that is another reason to grant certiorari. This Court can use this case to explore and expound upon the race-neutral explanation requirement of *Batson*. Given the increasing amount of white hate group violence against minorities in this country, and the prosecutions that result, it is guidance that the lower courts need.[8]

The Interlocutory Posture Of This Case Is Not An Obstacle To Review But Instead Presents An Opportunity For Review Which Will Not Often Arise

This Court is unlikely to have many opportunities as good as this one to decide the important federal constitutional issues presented here. Experience indicates that most state courts inclined to restrict the defense's racially

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[8]There are at least forty different white supremacist hate groups in this country, Southern Poverty Law Center, *Klanwatch Intelligence Report*, No. 36 (Feb. 1988), at 10-11, many of which advocate and practice violence against racial and ethnic minorities.

discriminatory use of peremptory challenges will do so on state law grounds. *E.g., People v. Wheeler,* 583 P.2d 748, 761-65 (Cal. 1978); *State v. Neil,* 457 So.2d 481, 486-87 (Fla. 1984). Such holdings do not present federal constitutional questions.

On the other hand, state courts not inclined to prevent racially discriminatory use of peremptory challenges by defense counsel are unlikely to generate many cases presenting federal questions which will survive for this Court's review. Denial of the prosecution's motion to restrict use of the defense's peremptory challenges will usually come too soon before trial to permit pretrial appellate review, as it did at the first trial of this case. Post-trial appellate review of a ruling in favor of the defense will be mooted if the defendant is convicted, and it will be barred by double jeopardy principles if he is acquitted.

The opportunity for review in this case arose because of the fortuitous occurrence of a mistrial after the trial court had permitted defense counsel to strike all the blacks from the jury at the first trial. See pp. 9-10, above. That mistrial permitted the State to re-present the issue, using the record from the first trial to prove defense counsel's intent and motivation for the upcoming retrial. The mistrial permitted the State to seek review of the trial court's ruling for purposes of the retrial, and it created time for review of the issue here.

The interlocutory posture of this case does not prevent review, because this Court can and has reviewed pre-trial orders in criminal cases. In *New York v. Quarles,* 467 U.S. 649, 651 n. 1 (1984), this Court granted the State's petition for review of a pre-trial suppression order, and it

did so for the same reasons it should do so here. This Court recognized in *Quarles* that unless review was granted at the pretrial stage, the federal question in that case would escape this Court's review regardless of the result of the trial. A conviction would moot the pretrial suppression order and an acquittal would raise a double jeopardy bar to review. *Id.* Precisely the same is true here.

Few opportunities for review of this issue will arise. Even in those cases where state courts prohibit defendants from racially discriminatory use of peremptory challenges and do it solely on federal constitutional grounds, there is no assurance this Court will have an opportunity to review the issue. An acquittal will bar review by this Court as will state appellate court reversal on other grounds.

Given the availability of supervisory control, *cf., United States v. Jackson,* 696 F.2d 578, 592-93 (8th Cir. 1982) (approving district court's pre-*Batson* use of supervisory power to restrict federal prosecutor's use of peremptory challenges against blacks), *cert. denied,* 460 U.S. 1073 (1983), it is unlikely that these federal constitutional issues will reach this Court through a federal criminal prosecution, either. The use of supervisory control to prohibit defense counsel from using their peremptory challenges in a racially discriminatory fashion in federal court may raise the issue of whether it is unconstitutional to restrict defense use of peremptory challenges. However, that is a different question from the one presented by this case: whether the Constitution requires that defense counsel be prohibited from the racially discriminatory use of peremptory challenges in state court.

That opportunities for review may be relatively rare does not mean that this federal question does not arise frequently. It does. See p. 14, above. A case squarely presenting an important federal constitutional issue that arises frequently in the lower courts but which this Court does not have many opportunities to review is one in which certiorari should be granted.

The Question Presented Is A Substantial One

The State Action Component

The principal, and perhaps only, argument against extending the rule of *Batson* to the defense is the contention that state action is lacking. That argument was made in this case below (27a-30a), and it was mentioned in the oral argument of the *Batson* case before this Court, 476 U.S. at 114-15. One of the best descriptions of the state action involved when defense counsel use peremptory challenges in a racially discriminatory manner is from a state court in New York:

> All three of those actions—participation, facilitation, and acquiescence—are involved here. The prospective jurors are summoned to appear for jury duty by the County Clerk or Commissioner of Jurors. The summonses are backed by the coercive power of government. The jurors are called by public officials to participate in a trial that is conducted in a public courtroom in a public building. The judge, with the aid of the court personnel, controls and guides the jury selection. The State Legislature empowers the defense to exclude jurors without giving a reason, and the same law facilitates discrimination, albeit inadvertently, by requiring that these challenges be exercised out of the presence of the jury panel. When the clerk asks the defendant to exercise peremptory

> challenges, defense counsel—an officer of the court and a member of the Bar established by the State, whose profession is regulated by the courts—calls the jurors' names or numbers out, and the judge accepts the challenges. Then in open court the judge or clerk orders the excluded jurors to leave, and they are guided out of the room by uniformed court officers or deputy sheriffs. The jurors perceive the judge as the person who is responsible for the conduct of the trial, and although they do not know whether the prosecutor, the defense lawyer, or the judge is rejecting them, they do know that officials of the State are telling them to leave. Under these circumstances, if all the black jurors—say, nine or ten—were asked to leave but only one or two whites out of a dozen were excluded, a perception that the Court was engaging in discrimination would be reasonable. If a black juror so excluded were to stop at a privately owned coffee shop in the lobby of the courthouse and were denied service because of his race, "State action" would be found. *See Burton v. Wilmington*, 365 U.S. 715. The same finding applies to racially motivated exclusion of the juror from the trial.

People v. Muriale, 526 N.Y.S.2d 367, 371-72 (Sup. 1988); *accord*, *People v. Gary M.*, 526 N.Y.S.2d 986, 994 (Sup. 1988), holding "the State is not merely an observer of the discrimination but a significant participant," because "[i]t supplies the tools (peremptory challenges), the place (courtroom), the object (juror), the setting (criminal action), and enforces the discrimination (discharge of juror)"; *see also*, *Shelley v. Kraemer*, 334 U.S. 1 (1948). At the least, certiorari ought to be granted to decide the state action issue.

The Stated Views of Members of this Court

While a majority of this Court did not state its views in the *Batson* case on the question presented by this certio-

rari petition, three members of the Court did. In arguing that peremptory challenges should be barred, Justice Marshall noted that "[t]he potential for racial prejudice, further, inheres in the defendant's challenge as well," *Batson v. Kentucky,* 476 U.S. at 108 (concurring opinion), and said: "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held,' " *id.,* at 107, quoting from *Hayes v. Missouri,* 120 U.S. 68, 70 (1887).

In an opinion joined by then-Justice Rehnquist, former Chief Justice Burger said:

> the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the Court has held that prosecutors are limited in their use of peremptory challenges, could we rationally hold that defendants are not? . . .

476 U.S. at 125-26 (dissenting opinion) (footnote omitted).

In the omitted footnote, the opinion quoted the observation in *United States v. Leslie,* 783 F.2d 541, 565 (5th Cir. 1986) (en banc), that "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." That was true until the Alabama courts held in this case that notwithstanding *Batson,* the Equal Protection Clause does not prohibit defendants from exercising their state-authorized peremptory challenges in an avowedly racially discriminatory manner. *See, People v. Muriale,* 526 N.Y.S.2d 367, 369 (Sup. 1988) (referring to

the Alabama court's ruling in this case as "a rare departure from this trend").

THIS COURT HAS JURISDICTION AND THE COURT OF CRIMINAL APPEALS IS THE COURT TO WHICH THE WRIT SHOULD RUN

An Adjudication On The Merits Of The Federal Issue

Under Alabama law, the Court of Criminal Appeals has jurisdiction to issue supervisory writs to trial courts, including writs of mandamus in relation to criminal prosecutions. Alabama Constitution of 1901, Amendment No. 328, § 6.03(c) & (d); *Code of Alabama* 1975, § 12-3-11; *Ex parte Nice,* 407 So.2d 874, 876-77 (Ala. 1981) (referring to the Court of Criminal Appeals' "broad grant of supervisory power" in mandamus cases). In Alabama, mandamus has been used to review novel questions, *Ex parte Nice,* 407 So.2d at 876, including questions arising from pre-trial motions involving whether precedent should be extended to new circumstances, *e.g., Ex parte Sides,* 501 So.2d 1262 (Ala. 1986).

The mandamus petition the State filed in the Court of Criminal Appeals clearly raised the federal Equal Protection Clause issue and the issue of whether *Batson* should be applied to defense counsel. (9a-11a) Because the petition met all the procedural prerequisites of Alabama law, *compare,* Alabama Rule of Appellate Procedure 21(a) *with* 9a-11a, there was no state law procedural reason to deny the petition. Therefore, the denial of the State's mandamus petition was an adjudication on the merits of the federal constitutional issues.

The Alabama Supreme Court has directed the Court of Criminal Appeals to issue mandamus where necessary in aid of the State's "lawful rights in the prosecution of criminal cases," *Ex parte Nice*, 407 So.2d at 879; where there is a compelling need of it to further important public interests, *id.*, at 880; and where legitimate interests of the State would be frustrated if mandamus did not issue, *id.*, at 882. Therefore, if the Court of Criminal Appeals had not agreed with the trial court's disposition of the federal constitutional issues, it would have issued the writ of mandamus.

Thus, the denial of mandamus review in Alabama is similar to denial or dismissal of an appellate writ for want of a substantial question in other states, which this Court views as a decision on the merits. *See, e.g., R. J. Reynolds Tobacco Co. v. Durham County*, 107 S.Ct. 499, 506 (1986). In any event, "[i]n the absence of positive assurance to the contrary" from the state appellate court, ambiguous appellate orders should be considered to be decisions on the merits. *Id.*[9]

A Final Judgment By The Highest Court Of The State In Which A Decision Could Be Had

A state appellate court's denial of mandamus on the merits is a "final judgment" in an original action for § 1257(3) purposes. *E.g., Detroit & Mackinac Railway*

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[9]Alternatively, if the Court of Criminal Appeals' denial of mandamus was a discretionary refusal to exercise its jurisdiction rather than a ruling on the merits, this Court still has jurisdiction. The only difference is that the writ should run to the trial court. See pp. 26-27, below.

Co. v. Michigan Railroad Commission, 240 U.S. 564, 571 (1916) ("it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute."); *American Express Co. v. Maynard,* 177 U.S. 404, 406 (1900).

The Alabama Supreme Court's discretionary denial of certiorari review (3a, 12a-13a) leaves the Court of Criminal Appeals' judgment denying mandamus as the decision of the highest state court in which a decision could be had. *E.g., Cohen v. California,* 403 U.S. 15, 17-18 (1971); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 678 n. 1 (1968).

A Timely Petition

This petition is timely filed. Rule 20's sixty-day period for filing a certiorari petition to review the Court of Criminal Appeals' decision runs from the Alabama Supreme Court's denial of certiorari on August 16, 1988 (3a). *See, e.g., American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21 (1923).

In The Alternative, The Alabama Supreme Court Or The Trial Court Is The Court To Which The Writ Should Run

Out of an abundance of procedural caution, at the same time it filed the certiorari petition in the Alabama Supreme Court the State also filed a new mandamus petition in that court which was materially identical to the mandamus petition which had been denied by the Alabama Court of Criminal Appeals. (14a-16a) The Alabama Su-

preme Court denied the mandamus petition without opinion. (4a)[10]

The Alabama Supreme Court has jurisdiction for discretionary certiorari review of the Court of Criminal Appeals' mandamus decisions. *See, e.g., Ex parte Nice, supra; Ex parte Sides, supra.* However, Alabama law limits the original mandamus jurisdiction of the Alabama Supreme Court to "matters in which no other court has jurisdiction." *Code of Alabama* 1975, § 12-2-7(2). Since Alabama law clearly gives the Court of Criminal Appeals original mandamus jurisdiction in criminal cases, see pp. 23-24, above, § 12-2-7(2) appears to preclude original mandamus jurisdiction in the Alabama Supreme Court.

If this Court disagrees and is of the view that the Alabama Supreme Court did have original mandamus jurisdiction in this matter, then the August 16, 1988 order of that court denying the mandamus petition (4a) is the judgment of the highest state court in which a decision could be had. That judgment would then be a "final judgment" subject to this Court's review. *E.g., Detroit & Mackinac Railway Co. v. Michigan Railroad Commission, supra; American Express Co. v. Maynard, supra.* In that case, the writ should run to the Alabama Supreme Court.

As a precaution, the State offers one more alternative. If the Court of Criminal Appeals' denial of the mandamus petition was a discretionary refusal to exercise its supervisory jurisdiction rather than a ruling on the merits (and

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[10]The Alabama Supreme Court order denying mandamus refers to two mandamus petitions in that court (4a); actually, it was two copies of the same petition given different numbers for each defendant.

there is no reason to believe it was), then the trial court is the "highest court of a state in which a decision could be had." Where discretionary review is available but denied, a trial court's judgment is the judgment of the highest court in which a decision could be had. *E.g., Chicago & Eastern Illinois Railroad Co. v. Industrial Commission,* 284 U.S. 296, 297-98 (1932); *Virginian Railway Co. v. Mullens,* 271 U.S. 220, 222 (1926).

Moreover, the trial court's order and judgment denying the State's substitute motion would be a "final judgment" under *New York v. Quarles,* 467 U.S. 649, 651 n. 1 (1984), which held that a pre-trial suppression order adverse to the State was a "final judgment" because the State could not obtain review of the underlying federal constitutional holding after trial no matter what the outcome. The same is true here. As in *Quarles,* "should the State convict respondent[s] at trial, its claim . . . will be moot. Should respondent[s] be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal." *Id.*

If the writ should run to the trial court, the petition is timely filed, because the Alabama appellate courts' discretionary denials of mandamus and certiorari review tolled the time for petitioning for certiorari under Rule 20. *E.g., American Railway Express Co. v. Levee, supra.*

The jurisdiction of this Court is not dependent upon which lower court should receive the writ. *See, e.g., R. J. Reynolds Tobacco Co. v. Durham Co., supra.* While the State believes this Court's writ should run to the Court of Criminal Appeals, see pp. 23-25, above, all the procedural bases have been covered. Therefore, if this Court con-

cludes that its writ should run to the Alabama Supreme Court or to the trial court, the State respectfully requests this Court to amend its docket accordingly. Regardless of which state court should receive the writ, this Court has jurisdiction to review the important federal constitutional question decided below, and it should exercise that jurisdiction.

———o———

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

1 Div. 785

Ex parte: State of Alabama

(In re: State of Alabama vs.
Benjamin F. Cox and in re:
State of Alabama vs.
Bennie J. Hays)

Petition for Writ of Mandamus

Mobile Circuit Court
No. CC87-2143 and No. CC87-2144

It is ordered that the petition for writ of mandamus be and the same is hereby denied.

Bowen, P.J., Tyson and Patterson, JJ., concur.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 28th day of June, 1988.

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF
ALABAMA

APPENDIX II

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

1 Div. 785

Ex parte: State of Alabama

(In re: State of Alabama vs.
Benjamin F. Cox and in re:
State of Alabama vs.
Bennie J. Hays)

Petition for Writ of Mandamus

Mobile Circuit Court
No. CC87-2143 and No. CC87-2144

It is ordered that the application for rehearing be and the same is hereby overruled and Rule 39(k), A.R.A.P., motion be and the same is hereby denied.

Bowen, P.J., Tyson, Taylor, Patterson and McMillan, JJ., concur.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 15th day of July, 1988.

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS

APPENDIX III

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 16, 1988

87-1275

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: State of Alabama v. Benjamin F. Cox and In Re: State of Alabama v. Bennie J. Hays)

ORDER

The petitioner having presented to the Court its petition for writ of certiorari, and the same having been duly examined by the Court,

IT IS ORDERED that the petition for writ of certiorari is denied.

Torbert, C.J., and Maddox, Almon, Shores, Beatty, Houston, and Steagall, JJ., concur.

APPENDIX IV

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 16, 1988

87-1276

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Benjamin F. Cox, (CV-87-2143))

87-1314

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Bennie J. Hays (CC-87-2144))

ORDER

The petitions for writ of mandamus to be directed to the Honorable Michael E. Zoghby, Judge of Circuit Court of Mobile County, Alabama, having been duly filed and submitted to the Court,

IT IS CONSIDERED AND ORDERED that the petitions for writs of mandamus are denied.

Torbert, C. J., and Maddox, Almon, Shores, Beatty, Houston, and Steagall, JJ., concur.

APPENDIX V

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

STATE OF ALABAMA	)	
vs.	)	No. CC 87-2143-MEZ
BENJAMIN F. COX	)	
STATE OF ALABAMA	)	
vs.	)	No. CC 87-2144-MEZ
BENNIE J. HAYS	)	

ORDER

On April 8, 1988, the State of Alabama filed a substitute motion to prohibit the defendants in these cases from exercising their peremptory challenges to remove blacks from the venire solely on racial grounds. A hearing was held on the motion on that same day. Based upon that hearing, previous proceedings before this Court, and agreement of the parties on certain undisputed matters, the Court enters the following factfindings.

The two defendants are white men and members or former members of the Klu Klux Klan who are charged with the racially motivated murder of Michael Donald, a young black man in Mobile, Alabama. The two defendants are charged with non-capital murder involving the same murder for which Henry Hays, the son of defendant Bennie J. Hays, has been convicted and sentenced to death. *See, Ex Parte Hays*, 518 So.2d 768 (Ala. 1986).

The joint trial of these two defendants began on February 1, 1988, and ended in a mistrial on February 5, 1988 after defendant Bennie J. Hays collapsed in the courtroom. The trial is due to be rescheduled.

Neil Hanley is the attorney who represented and still represents defendant Cox in this case, and Skip Brutkiewicz is the attorney who represented and still represents defendant Hays in this case.

On January 28, 1988, before the first trial began, the State filed a motion to prohibit the two defendants from exercising their peremptory challenges to remove blacks from the jury solely because of their race. A hearing was held on that motion on January 29, 1988. The transcript of that hearing attached to the State's April 8, 1988 substitute motion is a true and accurate transcript of the hearing.

On February 1, 1988, jury selection began. During jury selection, counsel for both defendants had an unlimited opportunity to question venire members concerning their biases and prejudices.

During voir dire, the Court asked if any veniremember knew of any reason he could not fairly try the case. One black veniremember stated that he could not be fair in a case in which the defendants were Klansmen. That veniremember was excused for cause. No other black veniremembers stated that they could not fairly try the case.

After some challenges for cause were granted, sixty-five veniremembers remained from which the jury was to be chosen, and sixteen of those veniremembers were black. Counsel for the two defendants used their peremptory challenges to strike some white and sixteen black veniremembers so that twelve whites were left to try the case. The State used all of its twenty-six peremptory challenges to strike all white veniremembers. Seven blacks were struck by the counsel for one defendant, and nine blacks were

struck by counsel for the other defendant peremptorily. One of the two alternate jurors was a black, and the last defense strike was used to strike him.

After defendants' counsels used their peremptory challenges to remove all the blacks from the jury, the District Attorney brought that fact to this Court's attention and reiterated the State's January 28, 1988 motion to prohibit the defendants from removing blacks for racial reasons. This Court then denied that motion because of its understanding that the *Batson* decision and its underlying principles were inapplicable to defense counsel.

At the hearing on April 8, 1988, on the substitute motion now before the Court, Assistant District Attorney Jerry Jackson testified concerning events that occurred during the voir dire and selection of the jury at the first trial of these cases. The Court finds that Mr. Jackson was a credible witness and that his testimony was truthful.

Attached to the State's April 8, 1988 substitute motion are copies of the State's January 28, 1988 motion to prohibit the two defendants from exercising their peremptory challenges to remove blacks from the jury solely because of their race; a transcript of the January 28, 1988 hearing on that motion; and a transcript of that part of the February 1, 1988 proceedings setting out testimony and the ruling In which the Court denied the State's January 28, 1988 motion. The Court finds that all three attachments to the State's April 8, 1988 substitute motion are true and correct copies of what they purport to be.

This Court is of the opinion that the State's April 8, 1988 substitute motion to prohibit the defendants from exercising their peremptory challenges to remove blacks from

the venire solely on racial grounds is due to be denied. The reason for this denial is that the decision in *Batson v. Kentucky,* 106 S.Ct. 1712 (1987), and the decision in *Ex parte Branch,* No. 86-500 (Ala. September 8, 1987), do not apply to defendants and their exercise of peremptory challenges. Under the law as it now exists, defendants do not have to give a reason for the exercise of their peremptory challenges.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that the State's April 8, 1988 substitute motion is DENIED.

May 20, 1988

/s/ Michael E. Zoghby
CIRCUIT JUDGE

APPENDIX VI

IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA

EX PARTE STATE OF ALABAMA,

Petitioner

RE: STATE OF ALABAMA

v.

CASE NO. .....

BENJAMIN F. COX

STATE OF ALABAMA

v.

BENNIE J. HAYS

PETITION FOR WRIT OF MANDAMUS
TO THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

* * *

Comes now the State of Alabama and petitions the above-named Court for a writ of mandamus to the Honorable Michael E. Zoghby, Circuit Judge, of the Mobile County Circuit Court and shows the following in support of this petition:

THE FACTS

(1) This petition stems from the trial court's denial of the State's substitute motion, dated April 8, 1988, to prohibit the two defendants from exercising their peremptory challenges at their upcoming trial to remove blacks from jury service solely on racial grounds. . . .

* * *

THE ISSUES PRESENTED

(19) The issues presented by this petition are:

(a) Whether federal constitutional law prevents criminal defendants from exercising their peremptory challenges to remove blacks from jury service solely on racial grounds.

* * *

THE RELIEF SOUGHT

(20) The State petitions this Court to order: (a) that defendants are prohibited at the scheduled retrial from using their peremptory challenges to remove black venire-members from the jury solely because of their race; (b) that defense counsel's use of peremptory challenges at the scheduled retrial in this case will be governed by the principles and guidelines applied to prosecutors in *Batson v. Kentucky,* 106 S.Ct. 1712 (1987), and *Ex parte Branch,* No. 86-500 (Ala., September 8, 1987); (c) that any racially motivated peremptory challenges by defense counsel will be disallowed; and, (d) that if defense counsel refuse to exercise their peremptory challenges in a non-racially discriminatory fashion, the Circuit Court itself will exercise defense counsel's peremptory challenges by some random selection process pursuant to *Code of Alabama* 1975, § 12-16-100(a).

REASONS WHY THE WRIT SHOULD ISSUE

(21) Federal Constitutional principles, including the principles announced in *Batson v. Kentucky,* 476 U.S. 79 (1986), require that a defendant as well as a prosecutor be prohibited from the discriminatory exercise of peremptory challenges, because any discrimination in the admin-

istration of justice is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. . . .

* * *

LIST OF APPENDICES

* * *

CERTIFICATE OF SERVICE

I certify that I have served a copy of this petition on the respondent judge and all other parties to the action in the trial court . . .

* * *

APPENDIX VII

IN THE ALABAMA SUPREME COURT

S.C. No. 87-1275

EX PARTE: STATE OF ALABAMA

RE: STATE OF ALABAMA v.
BENJAMIN F. COX

STATE OF ALABAMA v.
BENNIE J. HAYS

On Petition for Writ of Mandamus
to the Circuit Court of
Mobile County, Alabama

STATE OF ALABAMA'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

TO THE SUPREME COURT OF ALABAMA:

The State of Alabama respectfully petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Criminal Appeals in the above-styled case, under A.R.A.P. 39(k), and shows the following:

1. This petition arises from a case in which two Ku Klux Klansmen are charged with murdering a black man. The Circuit Court of Mobile County has held that neither the United States Constitution nor Alabama law prevents the defendants from removing blacks from the jury solely on racial grounds, and that the principles espoused in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Ex parte Branch*, No. 86-500 (Ala., Sept. 8, 1987), do not apply to defendants. The Court of Criminal Appeals has denied the State's petition for a writ of mandamus and has denied

the State's application for rehearing and Rule 39(k) request for factfindings. . . .

• • •

COURT OF CRIMINAL APPEALS ORDERS

• • •

FACTS AND PROCEDURAL HISTORY

• • •

GROUNDS FOR GRANTING THIS PETITION

22. Certiorari should be granted in this case because it involves two material questions of first impression in this State which require decision. Those two material questions are the following:

(a) Whether federal constitutional law prevents criminal defendants from exercising their peremptory challenges to remove blacks from jury service solely on racial grounds.

• • •

APPENDIX VIII

IN THE ALABAMA SUPREME COURT

S.C. NO. 87-1276 and
87-1314

EX PARTE: STATE OF ALABAMA

RE: STATE OF ALABAMA v. BENJAMIN F. COX

STATE OF ALABAMA v. BENNIE J. HAYS

STATE OF ALABAMA'S PETITION FOR WRIT OF MANDAMUS TO THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

TO THE SUPREME COURT OF ALABAMA:

The State of Alabama respectfully petitions this Honorable Court for a Petition for Writ of Mandamus to issue to the Circuit Court of Mobile County, and shows the following:

1. This petition arises from a case in which two Ku Klux Klansmen are charged with murdering a black man. The Circuit Court of Mobile County has held that neither the United States Constitution nor Alabama law prevents the defendants from removing blacks from the jury solely on racial grounds, and that the principles espoused in *Batson v. Kentucky,* 476 U.S. 79 (1986), and *Ex parte Branch,* No. 86-500 (Ala., Sept. 8, 1987), do not apply to defendants. . . . The facts and procedural history of this case are more particularly specified below.

* * *

FACTS AND PROCEDURAL HISTORY

* * *

THE ISSUES PRESENTED

22. The issues presented by this petition are:

(a) Whether federal constitutional law prevents criminal defendants from exercising their peremptory challenges to remove blacks from jury service solely on racial grounds.

* * *

THE RELIEF SOUGHT

23. The State petitions this Court to order: (a) that defendants are prohibited at the scheduled retrial from using their peremptory challenges to remove black veniremembers from the jury solely because of their race; (b) that defense counsel's use of peremptory challenges at the scheduled retrial in this case will be governed by the principles and guidelines applied to prosecutors in *Batson v. Kentucky,* 106 S.Ct. 1712 (1987), and *Ex parte Branch,* No. 86-500 (Ala., September 8, 1987); (c) that any racially motivated peremptory challenges by defense counsel will be disallowed; and, (d) that if defense counsel refuse to exercise their peremptory challenges in a non-racially discriminatory fashion, the Circuit Court itself will exercise defense counsel's peremptory challenges by some random selection process pursuant to *Code of Alabama* 1975, § 12-16-100(a).

REASONS WHY THE WRIT SHOULD ISSUE

24. Federal Constitutional principles, including the principles announced in *Batson v. Kentucky,* 476 U.S. 79 (1986), require that a defendant as well as a prosecutor be prohibited from the discriminatory exercise of peremptory

challenges, because any discrimination in the administration of justice is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. . . .

* * *

LIST OF ATTACHMENTS

* * *

LIST OF APPENDICES

* * *

CERTIFICATE OF SERVICE

I certify that I have served a copy of this petition on the respondent judge and all other parties to the action in the trial court and on the Court of Criminal Appeals . . .

* * *

APPENDIX IX

STATE OF ALABAMA
CIRCUIT COURT FOR THE COUNTY OF MOBILE
THIRTEENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA
vs. CASE NO. CC 87-2143
BENJAMIN F. COX

STATE OF ALABAMA
vs. CASE NO. CC 87-2144
BENNIE J. HAYS

CONSOLIDATED FOR TRIAL

TRANSCRIPT OF PROCEEDINGS

Before:

Honorable Michael E. Zoghby

Mobile, Alabama - Friday, April 8, 1988

Appearances:

For the State:
Chris N. Galanos, Esq.
District Attorney of Mobile County

* * *

Edward Carnes, Esq.
Assistant Attorney General of
Alabama

* * *

For Defendant Benjamin F. Cox:
Neil Hanley, Esq.

* * *

For Defendant Bennie J. Hays
Donald E. Brutkiewicz, Jr., Esq.

* * *

(p. 7) ROBERT G. JACKSON, JR. was sworn and testified as follows:

DIRECT EXAMINATION

By: Mr. Carnes:

Q State your name please sir.

A Robert Gerald Jackson, Jr.

Q What is your position, Mr. Jackson?

A I'm an Assistant District Attorney with the District Attorney's Office here in Mobile County.

Q Were you an Assistant District Attorney in the District Attorney's Office in January and February of this year?

A Yes, I was.

(p. 8) Q Were you present in Court when the Jury was stuck in this case, the Cox and Hays trial?

A Yes, I was.

Q On or about February 1, 1988?

A Yes, I was.

Q Were you present during voir dire in that case?

A Yes, I was.

Q Did you have any duties or functions assigned to you during Jury selection and voir dire?

A Yes, I was assisting Chris in the case and specifically as to voir dire, I was taking notes in regards to the Batson motion that we had filed, keeping track of the defense strikes and questions, et cetera.

Q All right, had the Batson motion been ruled on as of the time you were taking those notes?

A Not yet, no.

Q After the voir dire and after challenges for cause, do you know how many veniremen were left to be struck from?

A Yes, there were sixty-five after all the challenges for cause.

Q Okay, and how many of those veniremen were black and how many were white?

A Sixteen were black and the remainder were white. My (p. 9) addition is not very good. What's that, forty-nine?

Q Yes.

A Okay, forty-nine whites.

Q All right, and how many strikes—

Mr. Hanley: I'm sorry. I didn't get that Jury—

The Witness: Sixteen blacks.

Mr. Hanley: Sixteen blacks?

The Witness: Forty-nine whites. They come out to sixty-five.

Mr. Hanley: Okay.

Q How many strikes did each Defendant have in the case?

A The defense as a whole had twenty-six strikes from the pool of sixty-five. Frank Cox, who was represented by Neil Hanley exercised thirteen and Skip Brutkiewicz, who represented Hays, exercised thirteen strikes.

* * *

(p. 10) Q I'll show you what has been marked as States Exhibit Number 1, and ask you if you recognize it. (Witness looked at exhibit)

A Yes, I do.

Q And what is it?

A It's a list of the race of the strikes that were exercised by Neil Hanley and Skip Brutkiewicz as what the—to their clients.

Q All right, does it have the order in which the strikes were made?

A Yes, it does.

Q And was that list made from your notes?

A Yes, it was.

Q You took your notes contemporaneous with the strikes?

A Yes.

Q Is that list accurate?

A Yes, it is.

Mr. Carnes: Judge, at this time, we'd move for admission of States Exhibit 1.

Mr. Hanley: Judge, of course, we object to the entire proceeding, the motion and (p. 11) everything else. And so we specifically object to that document as being irrelevant and immaterial.

Mr. Brutkiewicz: We adopt—excuse me, Judge, we also make the same objection and adopt Mr. Hanley's argument, and for the record, we have done this before.

Mr. Hanley's defense and my defense are similar. Or our arguments or going to be similar, and I'd like to be able to adopt anything Mr. Hanley presents to the Court, and likewise, Mr. Hanley does with me.

* * *

The Court: All right, the Court will overrule both objections and allow it to be marked (p. 12) into evidence. (State's Exhibit No. 1 admitted into evidence)

* * *

Q Mr. Jackson, I'll show you what has been marked as States Exhibit 2.

(Witness looked at exhibit)

Q And tell the Court what that is.

A This is a list I prepared from my notes of the sixteen black Jurors that, or potential Jurors that were struck by the defense, and the order they were struck, their names, their race and their sex, and the defense that exercised each strike. The Defendant that exercised those strikes.

Q All right, so that excludes the white Jurors who were struck by the defense and just lists in order the striking of the blacks with their names?

A Right.

Q And their sex?

A Right.

Mr. Carnes: Judge, at this time we'd move (p. 13) introduction of States Exhibit 2

Mr. Brutkiewicz: We object, same grounds.

Mr. Hanley: Same objection, Your Honor. Same grounds.

The Court: This is a copy of your notes, or is this a compilation of your notes?

The Witness: It's—

Mr. Carnes: If I may clear that. Thank you, Your Honor, for the guidance.

Q Where did you get this list? Where did you draw it from?

A From my notes that I took contemporaneous with the striking procedure.

Q And have you studied this list?

A Yes.

Q Is it true and accurate?

A Yes, it is.

Mr. Carnes: Judge, at this time we'd re-move its admission.

Mr. Hanley: Same objection, Your Honor.

Mr. Brutkiewicz: Same objection.

The Court: As to relevancy?

Mr. Hanley: Irrelevancy, immateriality.

The Court: Overrule the objection on those grounds.

* * *

(p. 14) The Court: Okay, mark that into evidence.

* * *

(States Exhibit No. 2 admitted into evidence)

* * *

(p. 15) Q Of the twelve Jurors who were selected, the principal twelve Jurors without the two alternates, what was their race?

A They were all white.

* * *

Q During voir dire, did—were the black Veniremen and Venirewomen asked questions concerning their attitudes about the Ku Klux Klan and whether they could be fair in a racially motivated murder case involving a Klan's Defendant and a white victim?

A Yes, they were.

Q Were they asked extensive questions concerning it?

A They were questioned. Some of the questions were asked to the entire venire, and then in panels they (p. 16)

were questioned and individually questioned as far as whether they could be fair, knowing it was a Klan case and knowing that it was a black, young black man who had been killed, or alleged to have been killed by the Klan.

Q For racially motivated reasons?

A Right.

Q Did any of the black prospective jurors indicate that they could not be fair?

Mr. Hanley: I object to that. The record speaks for itself, Your Honor. It's hearsay.

Mr. Carnes: We don't have that in this record, Your Honor, because it hasn't been prepared.

The Court: I am going to overrule the objection.

Mr. Hanley: All right, sir.

A If my memory serve me, there was one that was removed for cause that said that—one black prospective juror—who said they could not be fair. Of the sixteen left, they all indicated that they could be fair.

Q All right, now of the sixteen blacks who were struck, as to the one that was removed for cause, was there any common—were they the same age or different (p. 17) ages?

A No, they were—the common characteristic, of course, was their race, but they were of different ages and different sex.

Q And did it include both unemployed and employed people?

A I'm not real sure as to that.

Q Did they appear to be from different economic groups?

A Yes.

Mr. Hanley: Object to what they appear to be.

The Court: I'll let the witness state as as to it appeared to him to be only. If he feels he can answer the question, I will allow him to answer, and the Court will give the answer whatever weight it deserves. I'll let you answer the last question.

Mr. Brutkiewicz: For Mr. Hays we also object. Object to him drawing conclusions, Judge.

The Court: Overruled. I'll let you answer the question.

Q I believe you have testified that they were different ages and sex?

A Right.

Q And did it appear to you to have any other, any common characteristic at all other than race, the sixteen (p. 18) blacks that were stricken?

Mr. Hanley: Same objection, Judge, what it appeared to him.

Mr. Brutkiewicz: Same objection—

The Court: Overruled.

Mr. Brutkiewicz: Same objection for Mr. Hays.

The Court: Overruled.

A No.

• • •

Cross-Examination

* * *

(p. 19) Q You struck all white people, did you?

A Yes sir, Judge.

Q Did you have a conversation with the prosecution team and discuss the striking of Jurors?

A Yes, we did.

Q Okay, and did you discuss that you would strike all whites?

A No, we did not. In fact, I remember specifically there was one black gentleman that we were going perhaps to strike. We never got to that point. We decided to let you all exercise your strikes and see if, as we thought you would, strike all the blacks, and you did. But there was one, at least one, that we were going to strike.

* * *

(p. 25) The Court: All right, Gentlemen, we'll hear legal arguments.

Mr. Galanos: At the risk of being redundant, but to summarize the chronology of these proceedings, we initially argued and re-argued today that the preclusion of blacks from the venire unconstitutionally denies black people the right to serve as Jurors, and the logical correlary to that is that Defendants in criminal proceedings are not the only people with a cognizable legal interest.

People excluded from Juries because of their race are as much aggrieved as those who are indicted and tried. The basis for that argument, if the Court please, was the

ruling by Judge Demacos in the Howard Beach case in New York last summer as well as the California Supreme Court decision of People versus Wheeler, (p. 26) cited at 583 P. 2nd 748.

And the thrust of what we were trying to argue at that time and what we are trying to persuade the Court of today is that Batson and its progeny, which would include the Alabama decision of Ex Parte Preston Branch, decided on September 8, 1987, stand for the proposition that neither the State nor the Defendant can preclude blacks from Jury service solely because of their race.

The initial argument which was proffered to the Court essentially consisted of those grounds. Subsequent thereto, as the Court is well aware, we did on February 1st of this year strike the Jury for the consolidated trial of Bennie Hays and Frank Cox, and as the record clearly reflects, of the sixteen potential black Jurors, the defense struck all sixteen, and what we respectfully submit to the Court is that that as a matter of law, is not proper.

That again by virtue of Batson and the State case of Branch as well as some (p. 27) State statutes which I will argue in a moment, if it is not appropriate for the State to strike potential black Jurors when a black Defendant is on trial, it is equally improper and unlawful for the defense when the Defendants are white and the victim black, to strike blacks solely because of their race.

• • •

(p. 33) Mr. Hanley: Secondly, Judge, you know what the most amazing thing about Chris' argument which, just was? He never mentioned what the Batson case, what,

what, what the ruling was. What the issue was: The Fourteenth Amendment. Equal protection.

He never mentioned it, and that's the whole key to the Batson case. That's what they keep on saying through it. if you'll read it, referring to the equal protection case. It's a Fourteenth Amendment Case, and the Fourteenth Amendment says that:

"No State shall make or enforce any law,"
and then:

"Nor deny any person in its jurisdiction the equal protection of the law."

"No State shall," and if you'll read Batson, they keep on referring to it, and time and time again, they say things like, "Official racial discrimination," (p. 34) that the central concern of the Fourteenth Amendment is to put an end to Government discrimination.

Time and time again they say it. For the Defendant's benefit. They never, ever, and I haven't read this case, but I'll bet you that they never say that the equal protection law, the Fourteenth Amendment, gives the State any right. It does just the opposite.

"No State shall deny a person within its jurisdiction the equal protection of the law," and that's what it's all about.

And for him not to mention I think shows you what kind of argument that is. If you read Batson, and I'll bet you, you could read this. They keep on talking about equal protection. the Fourteenth Amendment, equal protection, the Fourteenth Amendment.

The Court: You are saying then that Batson refers only to the rights of a Defendant?

Mr. Hanley: It does.

The Court: It's not the rights of a State?

(p. 35) Mr. Hanley: I would submit to you—

The Court: Does the State have any right to a right to a fair trial?

Mr. Hanley: Yes sir.

The Court: In what way?

Mr. Hanley: Well, the law—the law gives them the right to a fair trial. You sit up there, and if we try to pull anything off, then you jump on us, and if he tries to do anything improper, then you jump on him.

You basically apply the fair trial.

The Court: Is Batson then applying only to the rights of a Defendant in a case?

Mr. Hanley: Yes sir.

The Court: More so than the rights of a State?

Mr. Hanley: Yes sir. Well—

The Court: What about the Fourteenth Amendment?

Mr. Hanley: Yes sir.

The Court: That applies to the rights of citizens of a State, does it not?

Mr. Hanley: Yes.

The Court: Does a right of a citizen of the State to sit on a Jury have any application?

(p. 35) Mr. Hanley: Judge, I don't believe the Fourteenth Amendment spoke towards that.

* * *

(p. 40) The Court: Mr. Brutkiewicz.

Mr. Brutkiewicz: Judge, I adopt Mr. Hanley's argument.

(p. 41) The Court: Mr. Galanos.

Mr. Galanos: Yes sir. May we divide the rebuttal between Mr. Carnes and myself, and we shall be brief?

Number 1, the issue here as I believe the Court recognizes from the questions propounded to Mr. Hanley, is the right of a citizen in this case particularly a black citizen, to serve on a Jury.

And we would submit that a black person indeed has that right.

* * *

(p. 43) The Court: I think that Mr. Hanley's argument is: Black people on this Jury, not all juries, but this Jury where you have a Klan situation, where you have a black who was allegedly killed—maybe I shouldn't even go further and not even use the word allegedly, because there has been some convictions, purely for no other reason because he was in fact black as was indicated by some of the evidence in the case.

Mr. Galanos: Yes sir, but we had on this venire, and this is one of the reasons the (p. 44) Court if it chooses to rule, is not ruling in a vacuum: Of the sixteen people on that venire, all first of all were asked,

> Even though you are black and these Defendants are white, and are accused of murdering and lynching a black man, could you give these white Defendants a fair trial?

The response was affirmative, and if it were not, they would have been stricken for cause.

So even in this case we had black people who said, "We can give Klansmen a fair trial, even if they allegedly murdered and lynched a black man solely because of his race."

So I think again that it is just, does not logically flow that black people can't give a Klansman a fair trial.

And then the final argument is that we're not ruling in a vacuum here for the simple reason that on February 1st, 1988, sixteen black people were qualified as veniremen in this case, and all sixteen of them were stricken without any provision (p. 45) of a race neutral explanation, and there is no logical reason to believe that when we go back to trial on a date set by this Court, and the same thing wouldn't happen again.

• • •

APPENDIX X

STATE OF ALABAMA
CIRCUIT COURT FOR THE COUNTY OF MOBILE
THIRTEENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA
vs. CASE NO. CC 87-2143
BENJAMIN F. COX

STATE OF ALABAMA
vs. CASE NO. CC 87-2144
BENNIE J. HAYS

[STATE'S EXHIBIT 1
AT APRIL 8, 1988 HEARING]

	N. Hanley—Cox	S. Bruk.—Hays
1st	Black	White
2nd	White	Black
3rd	Black	White
4th	Black	Black
5th	Black	Black
6th	Black	Black
7th	Black	Black
8th	Black	Black
9th	Black	White
10th	White	White
11th	White	White
12th	Black	White
13th	White	Black (Alternate)

APPENDIX XI

STATE OF ALABAMA
CIRCUIT COURT FOR THE COUNTY OF MOBILE
THIRTEENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA
vs. CASE NO. CC 87-2143
BENJAMIN F. COX

STATE OF ALABAMA
vs. CASE NO. CC 87-2144
BENNIE J. HAYS

[STATE'S EXHIBIT 2
AT APRIL 8, 1988 HEARING]

Order	Name	Race	Sex	Defendant
1st	Francine Brock	B	F	Cox
2nd	Willie Niles	B	M	Hays
3rd	Veronica Fuller	B	F	Cox
4th	William Wright	B	M	Cox
5th	George Yates	B	M	Hays
6th	Marshal Agee	B	M	Cox
7th	Josephine McCovey	B	F	Hays
8th	Veronica Roper	B	F	Cox
9th	Freddia Montgomery	B	F	Hays
10th	Ella Gamble	B	F	Cox
11th	Johnnie Molette	B	M	Hays
12th	Margaret Jones	B	F	Cox
13th	Sarah Jones	B	F	Hays
14th	Freddie McCreay	B	M	Cox
15th	James Jefferson	B	M	Cox
16th	Ernest Dixon	B	M	Hays
(Alternate)				

APPENDIX XII

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	No. CC 87-2143-MEZ
vs.	)	
	)	
BENJAMIN F. COX	)	
	)	
STATE OF ALABAMA	)	
	)	No. CC 87-2144-MEZ
vs.	)	
	)	
BENNIE J. HAYS	)	

THE STATE'S SUBSTITUTE MOTION TO PROHIBIT DEFENDANTS FROM EXERCISING THEIR PEREMPTORY CHALLENGES TO REMOVE BLACKS FROM JURY SERVICE SOLELY ON RACIAL GROUNDS

Comes now the State of Alabama and substitutes this motion for the motion filed on February 10, 1988.

The State moves this Court to enter an order: ordering that defendants are prohibited from using their peremptory challenges to remove black veniremembers from the jury solely because of their race; ordering that any racially motivated peremptory challenges by defense counsel will be disallowed; ordering that if defense counsel adamantly refuse to exercise their peremptory challenges in a non-racially discriminatory fashion, the Court itself will exercise defense counsel's peremptory challenges by some random selection process; or, in the alternative, ordering that defense counsel's use of peremptory challenges in this case will be governed by the principles and guide-

lines applied to prosecutors in *Batson v. Kentucky,* 106 S.Ct. 1712 (1987), and *Ex Parte: Preston Branch,* No. 86-500 (Ala. Sep. 8, 1987). . . . In support of this motion, the State shows the following:

* * *

(13) Defense counsel's use of their peremptory challenges to remove blacks from the jury solely because they are black violates the Equal Protection Clause of the United States Constitution . . .

* * *

WHEREFORE, for the reasons stated, the State moves this Honorable Court to enter an order, ordering that: (1) defendants are prohibited from using their peremptory challenges to remove black veniremembers from the jury solely because of their race; (2) any racially motivated peremptory challenges by defense counsel will be disallowed; and (3) if defense counsel adamantly refuse to exercise their peremptory challenges in a non-racially discriminatory fashion, the Court itself will exercise defense counsel's peremptory challenges pursuant to *Code of Alabama* 1975, § 12-16-100(a); or, in the alternative (4) that defense counsel's use of peremptory challenges in this case will be governed by the principles and guidelines applied to prosecutors in *Batson v. Kentucky,* 106 S.Ct. 1712 (1987), and *Ex Parte: Preston Branch,* No. 86-500 (Ala. Sep. 8, 1987). The State also requests any and all other relief to which it may be entitled.

* * *

APPENDIX XIII

STATE OF ALABAMA
CIRCUIT COURT FOR THE COUNTY OF MOBILE
THIRTEENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA

vs. CASE NO. CC87-2143

BENJAMIN F. COX
Defendant

STATE OF ALABAMA

vs. CASE NO. CC87-2144

BENNIE J. HAYS
Defendant

CONSOLIDATED FOR TRIAL

• • •

February 1, 1988

• • •

(Jury having been struck)

• • •

(p. 4) Mr. Galanos: May we go on the record, sir?

The Court: Yes sir, we're on the record.

Mr. Galanos: May it please the Court, with reference to the motion filed and previously argued by the State last week, we would like to make the following showing:

One, that there were sixteen potential black jurors in this venire, and: Two, that the Defendant used sixteen of his preemptory strikes to strike all sixteen potential black jurors. Pursuant to the mandate of Batson, the

ruling by the Supreme Court of New York in the Howard Beach Case, and the ruling in the Supreme Court of California, and I believe the style of the case is People v. Wheeler, we would ask the Court at this (p. 5) time to demand that the Defendants make a showing as to the reason for striking all sixteen black potential jurors, and that if they cannot supply race neutral explanations to the satisfaction of the Court, then those sixteen people ought to be put back into the Jury pool and we should continue to strike.

The Court: Anything further, Mr. Galanos?

Mr. Galanos: No sir.

* * *

(p. 6) The Court: Relative to the request as made by the District Attorney, the Court will state that it is the Court's understanding that Batson does not apply to defense counsel.

The Court will deny the request of the State.

Mr. Galanos: Thank you.

APPENDIX XIV

STATE OF ALABAMA
CIRCUIT COURT FOR THE COUNTY OF MOBILE
THIRTEENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA

VS. CASE NO. CC 87-2143

BENJAMIN F. COX

STATE OF ALABAMA

VS. CASE NO. CC 87-2144

BENNIE J. HAYS

CONSOLIDATED FOR TRIAL
PROCEEDINGS OF JANUARY 29, 1988

(p. 3) The Court: The matter set before the Court today is the motions as filed by the Defendants and also the State relative to the trial set on Monday.

* * *

(p. 4) Mr. Galanos: And finally, the last motion that the State has and the most significant, and if Your Honor has not had time prior to today to consider this, we would ask that you take it under submission.

It is, for want of a better term, a reverse Batson motion. A motion to prohibit Defendants from exercising peremptory challenges based on race. And when copies of the motion were filed with (p. 5) the Court, both the motion and the brief were hand delivered to the Defense attorneys in this case.

* * *

(p. 6) The preclusion of blacks from the panel, regardless of whether it's by prosecution or Defendant, denies blacks the right to serve as Jurors, and again the heart of the arguments, especially in this case, where you have white Defendants alleged to have murdered a black man, is that the interest of the person, a potential Juror, is the interest that we seek to protect here as opposed to obviously that of the Defendant.

The Court: I was waiting when that would be filed. This probably an ideal type case to raise that issue, isn't it?

Mr. Galanos: Yes sir, and it is a novel issue. Like I said, it is to my knowledge the only time it has ever been ruled on this country, was in New York very recently in the Howard Beach case, and quite candidly, most of the research in the brief comes from the office of Judge Demacos, who provided us with the basis for his findings.

The Court: What did he rule. I can't find the (p. 7) (reading silently) "issue an order requiring the Defendant to defend its strikes of blacks from the venire."

All right, let me hear from you all, then.

Mr. Hanley: Judge, you said this was one of the best cases to be heard for the issue. It's the worst.

The Court: Is it?

Mr. Hanley: Because, I'll you why I'm going to strike, if I strike blacks. Because it's a Klan case, the same reasons I'd strike Jewish people if I had a PLO Defendant.

And it's a good Batson exception too. I'm not saying I'm going to, but certainly, in a—this is the worst possible case to file this motion.

If it was just a black victim and a white Defendant, perhaps. But in the case where we're involved in the KKK, whose avowed purpose is the supremacy of the white race, that is a sufficient and a good Batson reason for striking that person. And I have all the respect for you in the world, Judge, and I think, you (p. 8) know, I try cases in here, and I have been fair, but I—you—well, I feel that—as strongly about this as I have felt about anything since I have been practicing law.

And that for me not to strike a black person, if I felt it was appropriate after our voir, extensive voir dire that we have here, and if I thought it was appropriate, I'm going to strike him, for the reason that we're dealing with the—an organization who through, what a hundred years now, has been preying on black people.

That's my argument.

Mr. Brutkiewicz: Judge, my argument would also be this, and we're going to have a practical problem, too, because I, you know, I have got a duty to my client that far surpasses any duty to any, as Mr. Galanos said, a Juror to be able to sit on a case and hear it.

I'm, you know, if I deem it appropriate to strike every black person that's on the panel, I'm going to do it, (p. 9) and I guess if you order me not to it, I'm going to either get out of the case, or you're going to have to put me in jail.

Mr. Galanos: That's his problem.

Mr. Brutkiewicz: Well, that may be my problem, and I may be sitting in jail, but I'm not, certainly not going to, you know, I've got an ethical problem here.

Your Honor tells me I can't strike all the black I want to, and I feel it's in the best interest of my client, you know, we have got a problem. We've got a real bad problem.

* * *

(p. 11) The Court: I can, I can, I can see it. I can see it, and I said this is probably a good case to go up on. I have been waiting for it to happen.

As I'm beginning to think, and I'm being hit with this all at one time—Mr. Hanley strikes the blacks, and you say, "Why did you strike all the blacks from this," and he says, "I want the record to show that this Defendant is, belongs to an organization—

Mr. Hanley: Belonged.

The Court: Well, belonged, past tense, present, whatever—belonged to an organization that has for centuries —well, not for decades, expressed its opposition to the black race, so much so that it has historically lynched people, and what we are dealing with in this case (p. 12) is a lynching. And therefore, because of the fact that it's going to be brought out that my client belongs to this organization, that my client had made certain statements against the black race and against all people, that that is why I am striking him from the Jury.

Mr. Hanley: And the only—

The Court: Would that not be a valid reason to strike—

Mr. Galanos: No sir.

The Court: Is that racially motivated?

Mr. Galanos: Yes sir.

* * *

(p. 14) Mr. Brutkiewicz: In addition to that, Judge, we'd argue that, that the rights of an accused to have a Jury are at what's at issue here, not what the State's rights are, and not what individual members of the Jury's rights are.

It's what the rights of the Defendant in the criminal case are.

Mr. Hanley: And that's what Batson speaks to. They speak to the rights of the guy, the Defendant that sits here. They don't speak to the rights of the Jurors, or they don't—Batson doesn't speak to the right to the community—they speak to the rights of the Defendant. That's what Batson is about.

And of course, that New York, that Beach Case is a novel case, and it hasn't gone up, so we don't know what's going to happen to it.

(p. 15) Mr. Galanos: But somebody needs the guts to take a stand. And just because it has not been subject to appellate review at this point, I would respectfully submit, is not sufficient to base it, to say "No".

I would further submit because it—that there is precedent for it. It's not something we just manufactured, and

it—because of the uniqueness of the issues, again, we would ask Your Honor to think about it and to take it under submission as opposed to ruling.

The Court: I'm not going to rule on that right now. But it does bother me that the Defendant can say, "Look, my member—my client was a member of the Klan who for centuries have expressed hatred of the blacks, and this is a—he is being charged with hatred of the—that is, the murdering of a man purely because of race, and for no other reason. That's what he's being charged with. Picked up a black man off the street, didn't know who he was. And, as the State said, have him murdered, and therefore I don't want black people on (p. 16) the Jury."

* * *

(p. 17) Mr. Galanos: I can bring it home a little better.

The Court: Okay.

Mr. Galanos: Obviously I am Greek.

Mr. Hanley: No.

Mr. Galanos: The Turks murdered, slaughtered Greeks for years, more than a hundred years.

The Court: Oh huh (affirmatively).

Mr. Galanos: But it does not automatically follow that I, because I am Greek, hate every person of Turkish extraction. The mere fact that a potential Juror is black does not in and of itself say that that potential Juror is going to be biased or prejudiced against a Klansman.

To assume that, assumes that the entire black race is close minded and doesn't have the volition or the ability to decide whether or not they can be fair.

And again, Sir, if a black person is prejudiced against the Klan, there is a way for that person to legitimately be (p. 18) struck from the Jury. If they say, "I can't give a Klansman a fair trial," that takes care of the problem which Your Honor has raised.

But, and finally, just because a person is black in and of itself, does not mean that that black person is going to hate every Klansman or be biased or prejudiced against every Klansman.

Beulah Mae Donald herself, the mother of the man who was lynched, says that she had long since forgiven them for what they did to her child.

* * *

(p. 19) The Court: Now, the law is only that the State can't do it.

Mr. Brutkiewicz: Right. The law says that a Defendant can strike anybody he wants to for any reason.

The Court: But the law—

Mr. Brutkiewicz: And the law also says that the State cannot do it for purposes of race.

Now, that is, that is what the law says.

The Court: Has not the Supreme Court ruled on the issue as to the Defendant—

Mr. Brutkiewicz: No sir—

The Court: —being allowed—

Mr. Brutkiewicz: No sir. So the law is that the Defendant can do what he wants to do.

(p. 20) And Mr. Galanos is asking you to do something that the Eleventh Circuit castigated Judge Hand for doing, and that is, going against what is the law. And only until the Supreme Court says it's not the law any more, or only until the Supreme Court says you can do it, Your Honor is not supposed to take up novel ideas and throw them up as balloons for a test.

Mr. Galanos: I would never presume to tell you what you are supposed to do. But again, the mere fact that this is a case of first impression in the State of Alabama does not mean that it is not: A, not lawful, and B, not proper, nor C, not the morally correct thing to do.

Mr. Brutkiewicz: Morality has nothing to do with it at this point, Judge. It's what the law says, and the law says we are entitled to do it, and until the Supreme Court says we are not entitled to do it, I respectfully submit to Your Honor, that you are bound to follow the rules.

• • •

EDITOR'S NOTE

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88-630

No. 88-630

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BENJAMIN P. COX, and
BENNIE J. HAYS,

Petitioners,

v.

STATE OF ALABAMA,

Respondents.

On Petition For Writ Of Certiorari
To The Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment, which prohibits the states from denting any person equal protection of law, limit criminal defendants in the exercise of their peremptory challenges during the selection of a petit jury.

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SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment prohibits the states from denying any person equal protection of law. In Batson vs. Kentucky, 476 U.S. 79 (1986), and the cases cited within, this Court emphasized that the purpose of the Fourteenth Amendement was to end "governmental discrimination". It is clear from the wording of the Equal Protection Clause and this Court's analysis in Batson that the Fourteenth Amendment prohibits official governmental descrimination and has no appliction to a criminal defendant in the exercise of peremptory challenges.

REASONS FOR DENYING THE WRIT

I. The Fourteenth Amendment Prohibits Governmental Discrimination And Has No Aplication To A Criminal Defendant In The Exercise Of Peremptory Challenges.

Although not stated in their brief, the prosectuion informally calls this a "reverse Batson" case. The State urges that, based on Batson vs. Kentucky, supra, this Court rule that the Constitution limits a criminal defendant in the exercise of peremptory challenges.

The Batson decision is grounded entirely on the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides "nor shall any state... deny to any person within its jurisdiction the equal protection of the laws". (emphasis added)

In Batson, this Court repeatedly emphasized that the purpose of the Fourteenth Amendment was to end official governmental discrimination:

> In Swain v. Alabama, this Court recognized that a "State's purposeful or deliberate denial to Negroes on account of race or participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S., at 203-204, 13 L Ed 2nd 759, 85 S Ct 824. This principal has been "consistently and repeatedly" reaffirmed, id., at 204, 13 L Ed 2d 759, 85 S Ct 824, in numerous decisions of this Court both preceeding and following Swain. We reaffirm the principle today. 476 U.S. at 84
>
> In Strauder the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Id., at 306-307, 25 L Ed 664. 476 U.S. at 85
>
> The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, Strauder, supra, at 305, 25 L Ed 664, or on the false assumption that members of his race as a group are not qualified to serve as jurors, see Norris vs. Alabama, 294 U.S. 587, 599, 79 L Ed 1074, 55 S Ct 579 (1935); Neal vs. Delaware, 103 U.S. 370, 397, 26 L Ed 567 (1881). 476 U.S. at 86
>
> The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through

> its administrative officers in effecting the prohibited discrimination." Norris vs. Alabama, 294 U.S., at 589, 79 L Ed 1074, 55 S Ct 579; see Hernandez vs. Texas, 347 U.S. 475, 478-479, 98 L Ed 866, 74 S Ct 667 (1954); Ex parte Virginia, 100 U.S., at 346-347, 25 L Ed 676.
> 476 U.S. at 88
>
> Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, Hill vs. Texas, 316 U.S. 400, 406, 86 L Ed 1559, 62 S Ct 1159 (1942), the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at "other stages in the selection process," Avery vs. Georgia, 345 U.S. 559, 562, 97 L Ed 1244, 73 S Ct 891 (1953); see McCray vs. New York, supra, at 965, 968, 77 L Ed 2d 132,103 S Ct 2438 (Marshall, J., dissenting from denial of certiorari); see also Alexander vs. Louisiana, 405 U.S. 625, 632, 31 L Ed 2d 536, 92 S Ct 1221 (1972).
> 476 U.S. at 88-89

The Fourteenth Amendment prohibits the states from discriminating against its citizens. It cannot be construed to limit a criminal defendant in the exercise of peremptory challenges.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment prohibits official governmental discrimination. It does not apply to criminal defendants exercising peremptory challenges.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing to Don Siegelman, Alabama Attorney General, Ed Carnes, Sandra Stewart, Assistant Alabama Attorneys General, 11 South Union Street, Montgomery, AL 36130, and Chris W. Galanos, District Attorney, Mobile County court house, by placing same in the United States Mail, first class postage pre-paid this 30 day of November, 1988.

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No. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BENJAMIN F. COX, and
RANDY J. HAYS,

Petitioners,

v.

STATE OF ALABAMA,

Respondents.

FILING STATEMENT

Pursuant to Rule 28 of the Rules of the Supreme Court, I hereby certify that the Brief in Opposition and Motion For Leave to Appeal in Forma Pauperis in the above case were deposited in the City of Mobile Post Office on November 30, 1988, properly addressed to the Court with first class postage prepaid.

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MY COMMISSION EXPIRES: 10/23/90

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing to Don Siegelman, Alabama Attorney General, Ed Carnes, Sandra Stewart, Assistant Alabama Attorneys General, 11 South Union Street, Montgomery, AL 36130 and Chris W. Galanos, District Attorney, Mobile County court house, by placing same in the United States Mail, first class postage postage prepaid this 30 day of November, 1988.

NEIL HANLEY

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No. 88-630

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ALABAMA,
Petitioner,

vs.

BENJAMIN F. COX, and
BENNIE J. HAYS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF OF AMICI CURIAE

State of Missouri, Joined by the States of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

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QUESTIONS PRESENTED

1. Does the Equal Protection Clause prohibit white defendants charged with murdering a black person from using a state system of peremptory challenges to exclude black veniremembers from the jury solely because of their race?

2. Should the requirements and guidelines of *Batson v. Kentucky*, 476 U.S. 79 (1986), be extended to the use of peremptory challenges by defense counsel representing white defendants charged with crimes against black victims?

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Title VII of the Civil Rights Act of 1964, Section 701, et seq., 42 U.S.C.A. Section 2000e, et seq. 4

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INTEREST OF THE AMICI CURIAE

The states listed in Appendix B, by and through their respective Attorneys General, respectfully offer this brief as *amici curiae* in support of the position of the petitioner in this cause. All of the states joining in this brief have laws or rules of court providing for peremptory challenges. It is extremely difficult, however, for states to effectively present the issue of racially discriminatory peremptory challenges on the part of defense attorneys. As a result, defense attorneys, seeking every advantage, are free to remove minorities from juries for racially discriminatory purposes.

The precise issue raised in the present cause either has arisen or may arise in all of these states. For this reason, the *amici* have a substantial and continuing interest in cases such as the one at bar.

SUMMARY OF ARGUMENT

Defense counsels' use of peremptory challenges for racially discriminatory purposes violates the Fourteenth Amendment Equal Protection Clause. Courts cannot swear in jurors chosen on the basis of a racially discriminatory purpose without violating the Equal Protection Clause. The *prima facie* case guidelines of *Batson v. Kentucky*, 476 U.S. 79 (1986) should be applied to defense challenges as well as to those by prosecutors.

ARGUMENT

It is the position of the *amici curiae* that the United States Constitution forbids defense attorneys as well as prosecutors from exercising peremptory challenges for racially discriminatory purposes. *Prima facie* case guidelines should apply to both parties to the litigation.

I. Introduction

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1718 n. 12, 90 L.Ed.2d 69 (1986), this Court left open the question, "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." Given that defense counsel in the case at bar struck all blacks from the venire on the *assumption* that blacks could not be fair and impartial, the time to address the issue is at hand. Courts should not countenance purposeful racial discrimination in the selection of jurors by prosecutors or defense attorneys. Because the matter is of great concern to those responsible for prosecuting criminal offenses, *amici curiae*, each of whom has provided for the exercise of peremptory challenges,[1] respectfully submit the following discussion in support of the State of Alabama's petition for writ of certiorari to the Alabama Court of Criminal Appeals.

II. Applicability of the Equal Protection Clause

A prosecutor's use of peremptory challenges for racially discriminatory purposes violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v.*

---

1. *See* Appendix A.

Kentucky, supra. In *Batson* the Court continued its efforts, dating back to *Strauder v. West Virginia,* 100 U.S. (10 Otto) 303 (1880), to ensure that no citizen is denied access to one of society's most important institutions, the jury, solely on the basis of race. The Court held in *Strauder* that a state statute limiting qualification of jurors to white citizens violated the Equal Protection Clause. *Id.* at 310. As the Court pointed out,

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment?

Id. at 309.

The process continued in *Swain v. Alabama,* 380 U.S. 202 (1965). In *Swain,* the Court reiterated its position that "deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 204. In applying the rule specifically to the petit jury, the Court held that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." *Id.* at 227. Not surprisingly, the defendant in *Swain* was unable to carry that burden. *Id.* at 226.

Finally, in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 1714, 90 L.Ed.2d 69 (1986), the Court was called upon "to reexamine that portion of *Swain v. Alabama* . . .

concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Noting that some interpretations of *Swain* "placed on defendants a crippling burden of proof," *Id.* 106 S.Ct. at 1720, the *Batson* Court held "that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 1722-23. Further, Title VII[2] *prima facie* case guidelines provide the evidentiary tools for discerning the existence of purposeful racial discrimination. *Id.* at 1721 n. 18, 1722 n. 19, 1723.

Attention to the scope of *Batson* is essential to a just resolution of the issues presented in the case at bar. Although, as noted above, the *Batson* majority "express[ed] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," *id.* at 1718 n. 12, the Court's discussion of the harm resulting from purposeful racial discrimination in the selection of jurors applies equally to defense counsel:

> Competence to serve as juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial . . . A person's race simply "is unrelated to his fitness as a juror". . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch upon the entire community. Selection procedures that purpose-

---

2. Title VII of the Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.

> fully exclude black persons from juries undermine public confidence in the fairness of our system of justice. . . Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black] citizens that equal justice which the law aims to secure to all others."

Id. at 1717-18.

Can it truthfully be said that the precise situation will not prevail if defense attorneys exercise their peremptory challenges for racially discriminatory purposes? How then does one explain to an excluded juror that his or her race precludes fair and impartial judgment where defendants are concerned? The very thought is repugnant.

III. Equal Protection Clause Analysis

In order for a violation of the Fourteenth Amendment to occur, there must be some form of State action. *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). State action is clearly present when a defense attorney exercises peremptory challenges. Most obviously, a court cannot swear in a panel of jurors, chosen for racially discriminatory purposes, without placing an official stamp of approval on the underlying motive. That was the thrust of the Court's ruling in *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948), where the Court confronted "cases in which the States have made available to . . . individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of . . . rights. . ." The Court held that "in granting judicial enforcement of . . . [racially] restrictive agreements

in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." *Id.* at 20.

In reaching its conclusion, the Court in *Shelley* drew upon cases decided in the same term as *Strauder v. West Virginia, supra,* holding that "a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] [A]mendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." *Shelley v. Kraemer, supra* at 14, quoting *Commonwealth of Virginia v. Rives,* 100 U.S. (10 Otto) 313, 318 (1880). Therefore, "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer, supra* at 14.

The foregoing discussion yields the necessary conclusion that a New York court erred in finding no state action in a defense attorney's exercise of peremptory challenges. *See Holtzman v. Supreme Court, Kings County,* 526 N.Y.S.2d 892 (Sup. 1988). In *Holtzman,* the Supreme Court of Westchester County, New York, relied upon *Polk County v. Dodson,* 454 U.S. 312 (1981) in support of its ruling that defense attorneys cannot be "state actors." *Holtzman v. Supreme Court, Kings County, supra* at 898. First, the issue is not so much whether a defense attorney is a "state actor," but whether the *courts* may enforce racially discriminatory peremptory challenges without violating the Equal Protection Clause. *Shelley v. Kraemer, supra.* Second, it is important to note that *Polk County* merely addressed a defense attorney's role as "personal counselor and advocate." *Polk County v.*

Dodson, supra at 318. That role must be distinguished from the issue presented in the instant case because, as another New York court has observed,

> the State is not merely an observer of the discrimination, but a significant participant. It supplies the tools (peremptory challenges), the place (courtroom), the object (juror), the setting (criminal action), and enforces the discrimination (discharge of juror). The only thing the State does not do is make the decision to discriminate.

People v. Gary M., 526 N.Y.S.2d 986, 994 (Sup. 1988). The latter case is far more in keeping with the letter and spirit of the Equal Protection Clause, and the line of cases from *Strauder* to *Batson*, than is *Holtzman*. Surely one will not be heard to argue that purposeful racial discrimination is necessary to one's role as "personal counselor and advocate." Thus, it cannot be denied that in allowing purposeful racial discrimination in the selection of jurors, "the States have made available to . . . individuals the full coercive power of government to deny to [jurors], on the grounds of race or color, the enjoyment of [the equal protection of laws]. *Shelley v. Kraemer, supra* at 20. Purposeful racial discrimination on the part of defense attorneys in exercising peremptory challenges cannot withstand scrutiny under the Equal Protection Clause.

IV. Prosecutor's Standing to Raise the Equal Protection Clause Issue

The *amici* are aware that the general rule is that "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jack-*

son, 346 U.S. 249, 255 (1953). However, the general rule is not applied where one's rights "could not be effectively vindicated except through an appropriate representative before the Court." *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). To require the excluded jurors to bring separate lawsuits, in similar fashion to *Carter v. Jury Commission*, 396 U.S. 320 (1970), would be to place the same "crippling burden" upon jurors as the *Batson* Court found with respect to defendants as a result of *Swain v. Alabama*, *supra*. The best, most efficient place to remedy purposeful racial discrimination is right on the spot.

Granting third party standing is therefore essential in order to vindicate the equal protection rights of excluded jurors. *See* Note, "Discrimination by the Defense: Peremptory Challenges After *Batson v. Kentucky*," 88 Colum.L.Rev. 355, 358 (1988). Moreover, *Batson* implicitly granted to defendants third party standing to vindicate the rights of jurors improperly challenged by prosecutors. Considerations of fairness to jurors and judicial economy require granting third party standing to prosecutors as well. Both sides can be counted on to be effective advocates for the excluded jurors because both sides will have an extremely important "relationship between one who act[s] to protect the rights of a minority and the minority itself." *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972). Indeed, the adversarial setting assures effective advocacy.

V. Applying the Prima Facie Case Guidelines to Defense Challenges

As far as procedure is concerned, there is no reason why the Title VII *prima facie* case guidelines, applied

in *Batson* to prosecutors' peremptory challenges, *Batson v. Kentucky, supra,* 106 S.Ct. at 1721 n. 18, 1722 n. 19, 1723, should not apply to defense challenges as well. Because the *prima facie* case guidelines are merely evidentiary tools, there is no constitutional impediment to applying them equally to defense attorneys. Further, courts and attorneys are by now acquainted with *prima facie* case determinations of purposeful racial discrimination under *Batson.* There is no need to apply a different methodology for defense challenges when the goal is precisely the same as for prosecutors.

VI. CONCLUSION

Prior to *Batson,* several states had adopted the position that a defendant's use of peremptory challenges in a racially discriminatory manner is impermissible. *See State v. Neil,* 457 So.2d 481, 487 (Fla. 1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, 517 n. 35 (1979), *cert. denied,* 444 U.S. 881 (1979), citing *Singer v. United States,* 380 U.S. 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *Commonwealth v. Reid,* 384 Mass. 247, 424 N.E.2d 495, 499 (1981). *See also, Booker v. Jabe,* 775 F.2d 762 (6th Cir. 1985), on remand 801 F.2d 871 (1986), *cert. denied,* 107 S.Ct. 910 (1987). As courts become more familiar with the *Batson* requirements for prosecutors, they are more aware of its implications for defense challenges. *See State v. Alvarado,* 221 N.J.Super. 324, 534 A.2d 440 (1987); *Chew v. State,* 71 Md.App. 681, 527 A.2d 332 (Md. App.), *cert. granted,* 311 Md. 301, 534 A.2d 369 (1987); *People v. Muriale,* 526 N.Y.S.2d 367 (Sup. 1988); *People v. Gary M., supra.* Moreover, defense attorneys have every incentive to discriminate in the exercise of peremptory challenges owing to the

States' difficulty in bringing the issue before the courts, and prosecutors face increasing frustration in the face of obvious injustice. Indeed, the judge in the case at bar was bothered by what he saw but was constrained to hold that *Batson* does not apply to defense challenges.

The instant case therefore presents the perfect opportunity for this Court to establish the necessary constitutional foundation and parameters for applying *Batson* to peremptory challenges by defense attorneys. In doing so, the Court will surely promote the cause of equal justice.

Respectfully submitted,

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APPENDIX A

State Provisions for Peremptory Challenges*

AL Ala. Code Section 12-16-100(a) (Michie Repl. 1986)

AK Alaska Stat. Section 09.20.090 (Michie 1983)

AZ 17 A.R.S. Rules Crim.P., Rule 18.4(c) (West 1987)

AR Ark. Stat. Ann. Sections 16-33-303, 304, 305 (Michie 1987)

CA Cal. Penal Code Sections 1069-1070 (West 1985)

CO Colo. Rev. Stat. Ann. Section 16-10-104 (Repl. 1986)

CT Conn. Gen. Stat. Section 54-82g (Rev. 1987)

DL Del. Code Ann. Superior Ct. Rules Crim. P., Rule 24(b) (Michie 1974)

DC D. C. Superior Ct. Rules Crim. P., Rule 24(b) (Michie 1988)

FL F.S.A. Section 913.08 (West 1985)

GA Ga. Code Ann. Section 15-12-165 (1985)

HI Haw. Rev. Stat. Section 635-30 (Repl. 1985)

ID Idaho Code Sections 19-2013, 2015, 2016 (Michie Repl. 1987)

IL Ill. Stat. Ann. ch. 38 Section 115-4(e) (Smith-Hurd Supp. 1988)

IN Ind. Code Ann. Sections 35-37-1-3, 4 (Burns Repl. 1985)

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NH N.H. Rev. Stat. Ann. Sections 606: 3, 4 (Equity Repl. 1986)

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NM N.M. Stat. Ann. Section 38-5-14 (Michie Repl. 1987)

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* For a general overview of the differences among the states in exercising peremptory challenges, *see* Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images and Procedures*, 64 N.C. L.Rev. 501, 519 n. 104 (1986).

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In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

v.

BENJAMIN F. COX, and
BENNIE J. HAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

MOTION AND BRIEF OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND THE SOUTHERN POVERTY LAW CENTER AS AMICI CURIAE IN SUPPORT OF THE PETITION

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MOTION OF SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND SOUTHERN POVERTY LAW CENTER FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

Consent of the Parties

The Southern Christian Leadership Conference and the Southern Poverty Law Center hereby respectfully move for leave to file the attached brief amici curiae. The consent of counsel for the petitioner was requested and granted. The consent of counsel for the respondents was requested but refused.

Interests of the Amici Curiae

The Southern Christian Leadership Conference (SCLC) is a national civil rights organization. Founded in 1957 by Dr. Martin Luther King, Jr., the SCLC organized non-violent resistance throughout the South against legal segregation. In its 31-year history, the SCLC has worked to promote equal opportunity for blacks in employment, housing, education, voting, and other spheres.

The Southern Poverty Law Center is a non-profit organization founded in 1971 to advance the rights of poor people and minorities. Its attorneys have litigated employment discrimination, voting rights, capital punishment, and racial violence cases in both federal and state courts throughout the South as well as in the Supreme Court of the United States. It has brought numerous lawsuits against racist and white-supremacist organizations and individuals. *See, e.g., Person v. Miller*, 854 F.2d 656 (4th Cir. 1988) (assisted U.S. attorney in case in which Klan members convicted of violating court order banning paramilitary activities), *petition for cert. filed*, — U.S.L.W. — (U.S. Nov. 9, 1988) (No. 88-792); *McKinney v. Southern White Knights*, No. C87-565-CAM (N.D.Ga. 1988) (civil verdict against Klan groups and individuals for assaulting civil rights marchers); *Donald v. United Klans of America*, No. 84-0725 (S.D.Ala. 1987) (civil verdict on behalf of family of black man lynched by Klan); *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D.Tex. 1981) (injunction issued ordering Klan to stop harassing Vietnamese fishermen in Galveston Bay).

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BRIEF AMICI CURIAE OF SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

Statement of the Case

Amici adopt the Statement of the Case as set forth by the Petitioner.

Question Presented

Should the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), be extended to the use of peremptory challenges by defense counsel representing white defendants charged with crimes against black victims?

Reasons for Granting the Writ of Certiorari

I. The use of peremptory challenges by white defendants to exclude black venire members systematically from criminal juries deprives black citizens of equal protection of the laws.

This Court has long recognized that "[d]efendants...do not have the only cognizable legal interest in nondiscriminatory jury selection." *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970). Individual citizens "excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial discrimination." *Id.* As this Court stated in *Batson*, discrimination against blacks in jury selection "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85.

The interest of black venire members in not being struck on account of race by defense counsel is similar to the interest recognized by the *Batson* Court in not being so struck by the prosecutor. Nevertheless, the question presented by this case differs from that presented in *Batson* in two significant respects. First, because defense counsel do not have the direct connection to the state that prosecutors have, the existence of state action is not as readily apparent as it was in *Batson*. Second, this case implicates defendants' right to freely exercise their peremptory challenges. Neither of these considerations should prevent the extension of the *Batson* rule.

All actions that are part of the selection of a criminal

jury — whether performed by prosecutor, defense counsel, or judge — are state actions. *Cf. Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (finding state action in the acts of retained counsel in a criminal trial because "the State's conduct of a criminal trial itself implicates the State"). It does not matter to a black person turned away from jury service on the basis of his race that he was turned away by the defense attorney, rather than the prosecutor, any more than it mattered to black voters that they were prevented from voting in a Texas primary election by the Democratic party, rather than by the government. *See Smith v. Allwright*, 321 U.S. 649 (1944). In each case, the private actor who is discriminating is attempting to use his special position under state law to exclude black people from an important civic function. When the state permits a defense counsel to become a part of the state's "machinery for choosing" jurors and that counsel uses his prerogatives in a racially discriminatory manner, the state itself "endorses, adopts and enforces the discrimination against Negroes" and thereby denies them equal protection of the laws. *Id.* at 664.

Nor should the fact that extending the *Batson* rule would limit the use of peremptory challenges by the defense dissuade this Court from vindicating the rights of black venire members. This Court has "repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial." *Batson*, 476 U.S. at 108 (Marshall, J., concurring) (citing cases). Extending the rule of *Batson* would fall far short of that drastic but permissible step. The defense would remain free to use peremptory challenges for what should be their rightful purpose of "securing juries which in fact and in the

opinion of the parties are fair and impartial." *Swain v. Alabama*, 380 U.S. 202, 212 (1965). Defense counsel would only be barred from using peremptory challenges for a purpose — racial discrimination — for which they were never intended and should not be permitted.

II. Public confidence in the judicial system is undermined when the very judicial system that is charged with protecting the rights of minorities is infected with racial discrimination.

Racial discrimination is particularly insidious when it strikes at the very judicial system minorities must rely upon to protect them from discrimination. As the *Batson* Court noted, "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" *Batson*, 476 U.S. at 87-88 (*quoting Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). Racially discriminatory use of peremptory challenges by defense counsel is common and, particularly in a case like this one in which the judicial system is charged with protecting black citizens from racially motivated crime, it "undermine[s] public confidence in the fairness of our system of justice." *Id.* at 87.

Amici submit that racially discriminatory peremptory strikes by defense counsel, like similar challenges by prosecutors before *Batson*, are "both common and flagrant." *Id.* at 103 (Marshall, J., concurring). Although amici are not aware of any studies of racial bias in peremptory strikes by

defense counsel, *but cf. id.* (citing evidence of discriminatory use of peremptory strikes by prosecutors), it has been the experience of the Southern Poverty Law Center that defendants charged with racially motivated crimes do in fact use their peremptory challenges in a racially discriminatory manner. In the last three jury trials the Center has litigated involving the Ku Klux Klan, for example, this pattern has been abundantly clear. In *Donald v. United Klans of America,* No. 84-0725-AH (S.D.Ala. 1987), in which the Center represented the mother of a young black man lynched by the Klan, the defendants used all their peremptory challenges to strike blacks, resulting in an all-white jury. In *McKinney v. Southern White Knights,* No. C87-565-CAM (N.D.Ga. 1988), in which the Center represented civil rights marchers who were attacked by Klansmen throwing rocks and bottles, the defendants used all their peremptory challenges against black venire members, resulting in a jury with only one black person on it. And in *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988), *petition for cert. filed,* — U.S.L.W. — (U.S. Nov. 9, 1988) (No. 88-792), a criminal trial of Klan members who engaged in paramilitary activities in which the Center assisted the prosecution, the defendants used all their peremptory challenges against blacks, and only one black juror was left to deliberate with her fellow citizens. In short, in these three cases, every peremptory challenge that defendants *could* use to strike a black person they *did* use to strike a black person.

"[W]hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating." *Commonwealth v. Soares*, 387 N.E.2d 499, 517 n.35 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979). Racially discriminatory

peremptory challenges prevent blacks from participating and invite cynicism about the process on the part of the excluded.

These concerns loom particularly large today because of the recent growth of racially motivated crime and the national concern it has generated. *See* Anti-Defamation League of B'nai B'rith, The Hate Movement Today: A Chronicle of Violence and Disarray 1 (1987) (more criminal violence by racial extremists during the past three years than in the previous two decades); H.R. Rep. No. 575, 100th Cong., 2d Sess. at 10 (1988) (national concern over widely publicized cases including the beating deaths of Michael Griffith in Howard Beach, N.Y. in 1986 and of Loyal Garner in Hemphill, Texas, last Christmas). In 1987, the U.S. Department of Justice prosecuted 16 racial violence cases against 28 defendants, the most cases it has prosecuted in a single year in the past decade. *See* Southern Poverty Law Center, The Ku Klux Klan: A History of Racism and Violence 57 (3d ed. 1988). A far greater number of such cases were prosecuted on the local level. In cases such as these, the criminal justice system is itself on trial. As the *Batson* Court stated, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99. Amici respectfully submit that this case would provide this Court with an opportunity to further consider the question of how this goal can best be achieved.

Conclusion

For the foregoing reasons, amici respectfully suggest that the petition for a writ of certiorari be granted.

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Petitioner,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

MOTION OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

AND

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Petitioner,

—v.—

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

MOTION OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Elizabeth Holtzman, District Attorney of Kings County, New York, has authority to file the attached brief *amicus curiae* pursuant to Rule 36.4, because she is the authorized law officer of a political subdivision of a state.

The National District Attorneys Association, Inc., moves for leave to file the attached brief *amicus curiae*, pursuant to Rule 36.1. Counsel for petitioner has consented to the filing of this brief. Consent was sought from counsel for respondents, but was not obtained.

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November 28, 1988

QUESTION PRESENTED

Whether the equal protection clause of the fourteenth amendment prohibits judicial enforcement of race-based peremptory challenges by criminal defendants and their attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-630

STATE OF ALABAMA,

Petitioner,

—v.—

BENJAMIN F. COX and BENNIE J. HAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI FOR ELIZABETH HOLTZMAN, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.

STATEMENT OF INTEREST OF AMICI CURIAE

1. Elizabeth Holtzman is the District Attorney of Kings County, New York. Since taking office in January of 1982 she has filed many briefs seeking to persuade the courts of New York and of the United States that both the state and federal constitutions prohibit prosecutors and defense counsel alike from using the peremptory challenge to exclude potential jurors on the basis of race. *See People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S.

961 (1983) (declining to adopt the ban); *McCray v. Abrams*, 576 F.Supp. 1244, 1249 (E.D.N.Y. 1983), *remanded for a hearing*, 750 F.2d 1113, 1134-35 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986) (imposing sixth amendment ban on prosecutors); *Batson v. Kentucky*, 476 U.S. 79 (1986) (imposing fourteenth amendment ban on prosecutors); *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988), *appeal docketed* (2d Dep't March 21, 1988) (action for declaratory judgment extending ban to defense counsel).

Throughout the same seven-year period—including the period before this Court first made clear in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), that prosecutors are prohibited from exercising race-based peremptory challenges—District Attorney Holtzman has forbidden her staff from engaging in that practice, and has taken internal administrative steps to enforce that prohibition. During the same period she has instructed her staff to report to her instances where defense counsel appear to be excluding potential jurors on the basis of race, and in appropriate cases to ask for judicial intervention to stop defense counsel from exercising race-based challenges.

While members of her office have reported numerous cases where defense counsel appear to be exercising peremptory challenges on the basis of race, trial judges have been reluctant to intervene to stop that practice. Accordingly, in June of 1987, District Attorney Holtzman filed a complaint in state court seeking a judgment declaring that the United States and New York State constitutions prohibit criminal defendants and their attorneys from using peremptory challenges to exclude prospective jurors on the basis of race, religion, sex, or national origin, and prohibit judges from enforcing such challenges. The trial court dismissed the complaint on the ground that such discrimination and its enforcement did not constitute state action. *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup.Ct. Westchester Co. 1988). District Attorney Holtzman's appeal from that decision is pending.

Thus, District Attorney Holtzman has had almost seven years of experience litigating the issue presented by this case. In that time she has observed the frequency with which the issue arises, the reluctance of lower courts to resolve the issue, and the serious harm to constitutional values that occurs when courts enforce race-based challenges, whether made by prosecutors or defense counsel. For these reasons, she urges the Court to grant the writ of certiorari in this case and to hold that the Constitution prohibits courts from tolerating or enforcing race-based challenges, whether made by prosecutors or defense counsel.

2. The National District Attorneys Association, Inc. ("NDAA"), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications, and *amicus curiae* activity carry out its guiding purpose, since its founding in 1950, of reforming the criminal justice system for the benefit of all of our citizens.

For authority to file this brief, reference is made to the attached Motion for Leave to File Brief *Amicus Curiae*.

REASONS FOR GRANTING THE WRIT

Judicial Enforcement of Peremptory Challenges Made by Defense Counsel to Exclude Potential Jurors on the Basis of Race Raises a Substantial Constitutional Question of Great Public Importance Which Should Be Promptly Resolved By This Court.

When a state court enforces the use by defense counsel of peremptory challenges to exclude potential jurors on the basis of race, the state denies the equal protection of the laws to the excluded jurors, to the victims who are thereby denied a hearing of their complaint by their peers, and to all members of the excluded group thereby stigmatized as unfit to provide fair and impartial jurors. In addition to violating constitutional rights, the practice seriously undermines the confidence of the

excluded group and the community as a whole in the fairness of the criminal justice system.

A. The Issue Arises Frequently and Demands Prompt Resolution.

This issue arises frequently in the trial courts, and is creating great uncertainty throughout the nation, uncertainty which can only be resolved by this Court. Many criminal defense attorneys continue to believe, even after this Court's decision flagging the issue in *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986), that the Constitution does not prohibit judicial enforcement of race-based peremptory challenges by criminal defendants or their attorneys. Indeed, the instant Alabama case is only one recent and highly publicized example of the race-based exercise of peremptory challenges by defense counsel. Another example arose in New York, in *People v. Kern*, 137 A.D.2d 862, 524 N.Y.S.2d 521 (2d Dep't 1988), known as the Howard Beach case.

In *Kern*, tried in December 1987, several white teenagers were tried in Queens County, New York, for an unprovoked racially-motivated attack on four black men whose car had broken down in a white residential neighborhood. The trial judge found that the defendants appeared to be excluding black potential jurors on the basis of race and held that the *Batson* rule applied. Both the instant case and the Howard Beach case involve charges of racial violence. In such cases, the defense is especially likely to exclude minority jurors, and in such cases the exclusion of minority jurors has a particularly grievous effect in undermining community confidence in the verdict.

Prior to *Batson*, there were at least two similar examples in Miami, Florida. In one case, white police officers were tried on charges that they had beaten to death a black insurance executive. After the defendants exercised their peremptory challenges to remove all blacks from the panel, the all-white jury acquitted the defendants. The verdict touched off rioting in which fourteen people were killed and $200 million was lost in property damage, inventory losses, lost wages, and lost tourist

dollars. The Florida governor's report on the disturbance specifically identified the practice of excluding blacks from juries in racially sensitive cases as a cause of the riots and a reason for blacks in Dade County to distrust the criminal justice system. *See Andrews v. State*, 438 So.2d 480, 482 n.4 (Fla. Dist. Ct. App. 1983) (Ferguson, J., dissenting), quoting Miami Times, June 23, 1983, p.1, col.1.

Again, in 1984, violence and outrage followed the acquittal of four Miami police officers accused of killing black men. In each of the cases, defense lawyers had used their peremptory challenges to strike all blacks from the juries. *See* The New York Times, Mar. 18, 1984, p.23, cols. 1, 4. The exclusion of qualified jurors solely on the basis of race outraged the community and undermined the legitimacy of the judicial process.

In her own jurisdiction, too, *amicus* Holtzman has regularly observed defense counsel apparently excluding potential jurors on the basis of race in numerous cases involving racial violence. For example, two cases involved a single racially-motivated attack upon three black employees of the New York City Transit Authority. These employees, after finishing the late shift, had stopped for coffee in a white residential Brooklyn neighborhood, where they were attacked by a group of white teenagers. One of the victims was beaten to death with a wooden stick, and a second was seriously injured. One of the perpetrators, indicted for murder, was tried by an all-white jury and convicted of reckless manslaughter. *People v. Bova*, Kings County Indictment Number 3545/82. Another was indicted for murder and first degree assault, tried by a jury of eleven whites and one black, and convicted of third degree assault, a misdemeanor. *People v. Mormondo*, Kings County Indictment Number 3533/82. The defense attorney in *Mormondo* stated on the record that his "concept" of the case was not to have blacks on the jury, and the defense attorney in *Bova*, while not acknowledging discrimination, evinced it by using 15 of his 17 challenges to strike minority jurors and ensure an all-white jury.

Another incident of racial violence in Brooklyn provides yet another example. Three young white men were prosecuted for a

racially motivated assault on three black men who were on their way home from their jobs at the Veterans Administration in Brooklyn. *People v. Wiggins*, Kings County Indictment Number 2694/83. In that case, the trial judge found on the record that the defendants appeared to be excluding black potential jurors on the basis of race, but declined to do more than urge them to stop.

In Brooklyn, as elsewhere, the defense practice of race-based exclusions in prosecutions for racial violence has continued subsequent to *Batson*. For example, a white police officer was tried in Brooklyn in June of 1986 for the fatal shooting of a black teenager. His counsel used peremptory challenges to exclude eight black jurors, leaving only one black on the jury. The trial ended in an acquittal. *People* v. *Vacchio*, Kings County Indictment Number 117/85.

The issue arises not only in cases of racial violence, but also in less inflammatory (if no less serious) contexts. Thus, subsequent to *Batson*, the issue has arisen in Brooklyn trials of two black men charged with narcotics offenses, *People* v. *Duncan*, Kings County Indictment Number 4115/84 (defense counsel stated it was his "duty" to exclude potential jurors on basis of race); a black man charged with the murder of a Hispanic man, *People* v. *Carter*, Kings County Indictment Number 1093/86 (14 of 15 defense challenges against whites); a black man charged with attempted murder of a person of unknown race, *People v. Miller*, Kings County Indictment Number 4577/86 (13 of 13 defense challenges against whites); and a white man charged with narcotics and weapons offenses, *People v. Williams*, Kings County Indictment Number 8282/87 (9 of 9 defense challenges against whites).[1]

A few trial judges have been courageous enough to consider and rule on the issue directly. *See*, *e.g.*, *People v. Kern*, 137

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1 The facts of these Kings County cases are taken from the brief and reply brief for appellant in the pending appeal to the New York State Supreme Court, Appellate Division, in *Holtzman v. Supreme Court*, 139 Misc. 2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988), *appeal docketed* (2d Dep't March 21, 1988).

A.D.2d 862, 524 N.Y.S.2d 521 (2d Dep't 1988) (the Howard Beach case, appeal pending); *People v. Gary M.*, 138 Misc.2d 1081, 526 N.Y.S.2d 986 (Sup. Ct. Kings Co. 1988) (no appeal because of acquittal); *People v. Muriale*, 138 Misc.2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. Kings Co. 1988) (no appeal because of guilty plea); *Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988) (declaratory judgment, appeal pending). Others have felt it inappropriate to entertain the issue in the absence of a directive from higher authority. *See, e.g., Carter, Miller, Williams*, and *Wiggins, supra.*

While the issue recurs frequently in the trial courts, it arises far less frequently in the appellate courts. First, if the trial judge permits defense counsel to use race-based challenges, then unless interlocutory relief is available, as in this case, the prosecutor is barred from obtaining appellate review. Second, if the trial judge prohibits defense counsel from using race-based challenges, appellate review may nevertheless be frustrated, whether by an acquittal (*Gary M.*), a guilty plea (*Muriale*), or some other fortuity. For example, in the Howard Beach case the sole juror seated over defense objection was excused for personal reasons before deliberations began, possibly mooting the issue for appeal. Thus, the trial courts continue to wrestle daily with this important constitutional issue without the authoritative guidance they so desperately need. This Court should grant certiorari in order to resolve this important question.

B. The Constitutional Question is Substantial.

1. The Constitutional Rights of Jurors and the Public are Violated.

This Court has long recognized that race discrimination in jury selection violates the equal protection rights not only of criminal defendants, but also the equal protection rights and other legitimate interests of excluded jurors, of other members of the stigmatized group, and of the public. *Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970); *Ex parte Virginia*,

100 U.S. 339, 345 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

The rights of prospective jurors are violated by race-based challenges because the prospective jurors are denied their constitutional right to participate equally in the administration of justice without regard to race. While no person has a right to sit as a juror in any particular case, the United States Constitution guarantees to all persons that they will not be excluded from jury service on the basis of race. Persons who comply with their civic duty to appear when summoned for jury service have a constitutional right to be selected, or rejected, on the basis of their individual characteristics rather than as members of a racial group. *Batson v. Kentucky*, 476 U.S. at 87-88; *Carter v. Jury Commission*, 396 U.S. at 329-30; *Strauder v. West Virginia*, 100 U.S. at 308.

Moreover, other members of the stigmatized group are also denied equal protection of the laws when the jury selection process casts "a brand upon them . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder v. West Virginia*, 100 U.S. at 308; *accord*, *Carter v. Jury Commission*, 396 U.S. at 330.

Finally, the public at large is harmed by race-based challenges because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. at 87. In addition, the public at large is harmed by the "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946).

Thus, once the Court in *Batson* extended to the peremptory challenge phase of jury selection the prohibition on race discrimination, the conclusion inevitably followed that race-based peremptory challenges, like any other form of race discrimination in jury selection, violate the rights of not only defendants

but also excluded jurors and the public. *Batson v. Kentucky*, 476 U.S. at 87-88.

Because rights other than those of the defendant are at stake, the defendant may not avoid the constitutional ban on discrimination merely by noting that the equal protection rights protected by *Batson* can be asserted or waived as the defendant alone sees fit.[2]

Moreover, the excluded jurors and the public experience precisely the same injury from the race-based exclusion of potential jurors, whether the challenges are exercised by prosecutors or by defense attorneys. Indeed, ordinarily the jurors and the public are not told which party challenged which jurors, and their perception is therefore simply that the criminal justice system has determined that jurors of a certain race are unfit to serve in a particular case.[3]

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2 Indeed, there are limits on a defendant's power to waive even those rights that appear to belong solely to the defendant, such as the various trial rights contained in the sixth amendment. *See, e.g., Wheat v. United States*, 108 S.Ct. 1692 (1988) (right to conflict-free counsel does not imply unfettered right to waiver of conflict); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (right to counsel does not imply unfettered right to waiver of counsel); *Singer v. United States*, 380 U.S. 24, 36 (1965) (right to trial does not imply unfettered right to waiver of trial, *i.e.*, to guilty plea); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("process of juror selection is . . . matter of importance, not simply to the adversaries but to the criminal justice system"); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 382-83 (1979) ("independent public interest in the enforcement of sixth amendment guarantees"). Thus, if the *Batson* rule is also required by the sixth amendment, *see Teague v. Lane*, No. 87-5259, argued October 4, 1988, then the defendant's power to waive that right should likewise be limited by the public interest in avoiding race discrimination in jury selection.

3 In a case in Kings County, New York, where a Hispanic defendant was charged with killing a black victim, the defense counsel systematically struck all black potential jurors. *People v. Rosado*, Kings County Indictment Number 4540/83. One black potential juror sent a letter to the District Attorney complaining bitterly of the exclusion and seeking some way to purge the court system of this kind of discrimination. The text of the letter is attached as an appendix.

In part for that reason, almost every other court that anticipated *Batson* in prohibiting race-based peremptory challenges by prosecutors also applied the rule to defense counsel. *See Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated*, 478 U.S. 1001 (1986), *reinstated*, 801 F.2d 871, 872 (1986), *cert. denied*, 479 U.S. 1046 (1987); *People v. Wheeler*, 22 Cal.3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 907 n.29 (1978); *State v. Neil*, 457 So.2d 481, 487 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 490 n.35, 387 N.E.2d 499, 517 n.35, *cert. denied*, 444 U.S. 881 (1979).

But none of these courts decided the precise question presented by this case. The Sixth Circuit rested its holding on the sixth amendment, and the state courts on their respective state constitutions. The cases stand uniformly for the proposition that excluded jurors and the public are equally harmed, whether discriminatory challenges are exercised by prosecutors or defense counsel. They do not, however, address the question presented here: whether the federal equal protection clause protects excluded jurors and the public from that harm.

2. Judicial Enforcement of Defense Counsel's Challenges Constitutes State Action.

The argument most frequently raised against extending the *Baston* rule to defense counsel is that this Court's decision in *Polk County v. Dodson*, 454 U.S. 312 (1981), compels the conclusion that there is no state action in defense counsel's exercise of peremptory challenges and thus that such conduct cannot violate the equal protection clause of the fourteenth amendment. *See, e.g., Holtzman v. Supreme Court*, 139 Misc.2d 109, 526 N.Y.S.2d 892 (Sup. Ct. Westchester Co. 1988).

While the issue is indisputably a substantial one, the argument is fundamentally flawed. This Court obviously recognized that *Polk County* was not controlling when it reserved in *Batson* the issue presented by this case. 476 U.S. at 89 n.12. Moreover, the jury selection process at issue here clearly satisfies the test for state action established by a long line of decisions from this Court.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court set forth a two-prong test for state action: "[f]irst, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the state . . . ; [s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." 457 U.S. at 937.

Both prongs of *Lugar* are satisfied here. First, it is well-settled that the peremptory challenge is a state-created privilege and not a right conferred or recognized by the federal constitution. *See, e.g., Gray v. Mississippi*, 107 S.Ct. 2045, 2054 (1987); *Batson v. Kentucky*, 476 U.S. at 108 (Marshall, J., concurring); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919). Thus, the peremptory challenge is a state-created right like the writ of attachment at issue in *Lugar*, and unlike the private takings which were not state action in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

Second, the parties charged with the deprivation here are state actors. The judges who enforce race-based challenges are obviously state officials. The defense attorneys in exercising race-based challenges also "may fairly be regarded as state actors" both because they require the participation and assistance of the court to enforce their challenges, and because of the inextricable involvement of the state in the discriminatory jury selection at issue here.

Each aspect of that involvement, without the others, has been held to be a weighty factor contributing to a finding of state action in prior decisions of this Court. Together, they point irresistibly to that conclusion.

First, potential jurors are exposed to the humiliation of discriminatory challenges only as a result of state coercion, because the state summons people for jury service under threat of criminal prosecution for failure to appear. This Court has repeatedly recognized that state compulsion is a factor pointing

to a finding of state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. at 939; *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 170 (1970).

Second, race-based challenges occur exclusively on state property, in state courtrooms. Because the state is implicated in discrimination by a private restaurant located in a public building, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), it must also be implicated in discrimination by an attorney in a public proceeding in a public courthouse.

Third, race-based challenges occur not merely in a public building, but in a proceeding created and conducted by the state. In *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980), this Court held that "a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment."

Fourth, judicial enforcement is necessary to give effect to defense counsel's race-based challenges, and judicial enforcement of race discrimination is itself discriminatory state action. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelly v. Kraemer*, 334 U.S. 1 (1948).

Fifth, the selection of a jury is an inherently governmental function. A state cannot avoid its obligation to maintain a nondiscriminatory jury selection system by delegating part of the selection process to private parties. In *Nixon v. Condon*, 286 U.S. 73 (1932), this Court held that Alabama could not exclude blacks from voting by delegating to a private political party the task of determining qualifications for primary voters, and permitting that party to bar blacks from the party primary. *Accord, Terry v. Adams*, 345 U.S. 461 (1953). *See also Evans v. Newton*, 382 U.S. 296, 299 (1966) (state action when state delegates management of segregated municipal park). Similarly, the state may not exclude blacks or any racial groups from jury service by delegating the task of jury selection in part to a private attorney, and permitting that attorney to exclude a class of jurors through discriminatory exercise of the peremptory challenge.

There is simply nothing private about the selection of jurors or the use of peremptory challenges. They take place as part of a governmental proceeding, in a public courthouse, for public purposes. Moreover, peremptory challenges are available for use (or abuse when used to discriminate unconstitutionally) solely as a result of state legislation creating them. Finally, they depend on public enforcement from the initial summons that brings potential jurors to the courthouse and subjects them to discrimination, to the final actions of the judge and court officers in seating and then excluding jurors who are so challenged. For each of these reasons, and all of them together, the nexus between the state and the discriminatory acts is sufficient to render judicial enforcement of defense counsel's race-based challenges state action that denies the equal protection of the laws to excluded jurors and to members of the stigmatized group, and violates the rights of the public at large.

3. The Prosecutor has Standing to Assert the Equal Protection Rights of Excluded Jurors and Members of the Public.

In a long line of cases, this Court has recognized a litigant's standing to assert the rights of third parties when three conditions are satisfied: a) a close nexus between the litigant and the third parties whose constitutional rights are at stake, b) serious obstacles to the assertion of the right by the third parties themselves, and c) injury-in-fact to the litigant. Thus, private schools have standing to assert the rights of parents and students to choose private school education. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Likewise, physicians have standing to assert the rights of their patients to contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *cf. Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972) (nonphysician distributor of contraceptives); and to abortion, *Singleton v. Wulff*, 428 U.S. 106, 111-18 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). Beer sellers have standing to invoke their young male customers' equal protection rights to buy beer at the same age as women. *Craig v. Boren*, 429 U.S. 190, 192-97 (1976). Property sellers have standing to invoke their buyers' equal protection rights to

avoid the enforcement of a racially restrictive covenant. *Barrows v. Jackson*, 346 U.S. 249, 255-58 (1953).

In all of these cases the litigants were injured in their business or economic interests, though not in the exercise of their own constitutional rights. The victims whose constitutional rights were violated were ill-situated to litigate on their own behalf, whether for reasons of privacy, or small individual stake in the outcome, or for other reasons. The nexus between the litigants and the victims whose constitutional rights were violated was sufficient to assure the court of vigorous advocacy of the victims' rights.

So too here, the three prerequisites for standing are satisfied. First, the prosecutor is injured in the performance of his or her professional and statutory obligations. The public prosecutor has an undeniable interest in conducting orderly, fair, and lawful criminal trials that command community confidence. That interest is seriously impaired when juries are selected on the basis of race. Unconstitutional discrimination in jury selection may well impair the ability of a jury to engage in impartial fact finding. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). In addition, it undermines public confidence in the fairness of the criminal justice system, *see Batson v. Kentucky*, 476 U.S. 79, 87 (1986), and impairs the prosecutor's ability to investigate and prosecute crimes and to obtain the cooperation of victims and witnesses. Indeed, excluded jurors frequently believe the prosecutor is responsible for discrimination in jury selection, no matter who is in fact responsible, and they hold the prosecutor responsible for correcting the situation (*see* juror letter appended hereto). Thus the prosecutor clearly suffers injury-in-fact.

Moreover, as in the cases cited above, the victims of the discrimination are ill-suited to vindicate their own rights. First, potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their selection or exclusion. Their equal protection rights, therefore, can best be vindicated only if the prosecutor is permitted to challenge what appears to be discrimination in the defendant's exercise of

peremptory challenges while that discrimination is occurring. Second, because all jury challenges are made outside the jury's presence, excluded jurors are ill-situated even to know, much less to allege and prove, which party to the criminal action was responsible for their exclusion and why. Third, an excluded juror would be barred from seeking damages by the qualified immunity of judges, *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), and could not easily obtain declaratory or injunctive relief because it would be difficult to demonstrate the likelihood of a repetition for any particular juror. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983); *Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976). And fourth, the practical barriers to suit by an excluded juror are at least as great as the legal barriers, because of the small stake of any individual juror.

Finally, the nexus between the prosecutor and the excluded juror is close enough to assure vigorous advocacy of the juror's rights. The public prosecutor has an official duty to assure that jury selection proceeds in a constitutional manner. That interest is virtually identical in this case to the interest of the excluded juror in avoiding unconstitutional exclusion from jury service. Moreover, the nexus is strengthened by several additional facts. First, excluded jurors frequently hold the prosecutor responsible for unfair jury selection practices, no matter who is in fact responsible. Second, the prosecutor has an interest in assuring that potential jurors are satisfied with the fairness of the jury selection process because he or she has the ultimate responsibility for compelling them to appear for jury service by prosecuting them if they intentionally fail to respond to a jury summons. Third, the prosecutor's interest in preventing discrimination in jury selection is supported by his or her interest in impartial fact finding and in public confidence in jury verdicts.

Thus, because the injury to the prosecutor in this case is clear, the nexus to the excluded jurors strong, and the barriers to suit by the excluded jurors substantial, the prosecutor has standing to assert the constitutional rights of potential jurors to be considered for jury service without regard to race.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to decide the important constitutional question presented by this case.

Respectfully submitted,

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November 28, 1988

APPENDIX

11/21/84

Elizabeth Holtzman
District Attorney
210 Jorelmon Street
Brooklyn, N.Y.

Dear Mrs. Holtzman:

I am not sure that I am writing to the right person, if not possible you will be able to put this bit of information in the right place.

I am writing concerning the New York (Brooklyn) Judicial system. Which has turned out to be one big joke, a waste of time and the tax payers money.

I am a common laborer not professing to know law, but I do have common sense and understanding. I was summon to Supreme Court 11/15/84 to serve as a possible Trial Juror. After walking about for four days, I was finally called and sent to court room 574 part II, 11/21/84. Presiding Judge Leone, defendant Mr. Rosada. There were a least sixty or seventy people sent to room 574 to pick a jury of twelve plus two alternates. The majority of the groups sent were Blacks. Mr. Rosado is being tried for Murder 11/23/84.

After telling us what the law expected of us as possible Jurors, which as the Judge stated was common sense and a promise from each of us to be fair and impartial then the selection began; it made no difference to the Judge the District Attorney or the defendants Lawyer that the majority of the prospective Jurors were Black. They manage to pick thirteen (13) whites and one black *second* alternate making sure of an all white Jury.

We were also reminded that we if selected as a Juror, were not suppose to take Sympathy into the founding of a Verdict. But Mrs. Rosado was in the court room while the selection was being made she is about seven months pregnant. She was seated right a long with the prospective Jurors and if that isn't a sympathy pitch I've never seen one. Some of us do have common sense.

And so I ask you Mrs. Holtzman if we Blacks don't have common sense and don't know how to be fair and impartial, why send these Summons to us? why are we subject to finds of 250.00 if we dont appear and told it's our civic duty if we ask to be excused. Why bother to call us down to these courts and then over look us like a bunch of niave or better yet ignorant children. We could be on our jobs or in schools trying to help our selves instead of in court house Halls being Made fools of.

I will not sign my name because I am a little person and will surely get the short end of the stick. I just thought it was time for some one to Know about the Judicial system and if there is anything that can be done or anyone who wants to do it, the matter will be taken care of. A Copy of this letter will be sent to Eye Witness News.

Thanking You